

LAND USE COMMISSION HEARING

STATE OF HAWAI'I

Proceedings held on May 22, 2019

Natural Energy Laboratory Hawai'i Authority

73-987 Makako Bay Drive

Kailua-Kona, Hawai'i 96740-2637

Commencing at 9:30 a.m.

AGENDA

I. CALL TO ORDER

II. ADOPTION OF MINUTES

III. TENTATIVE MEETING SCHEDULE

IV. HEARING AND ACTION  
A06-770 The Shopoff Group, L.P. (HAWAI'I)

V. ACTION  
A02-737 U of N BENCORP (HAWAI'I)

VI. HEARING AND ACTION  
A02-737 U of N BENCORP (HAWAI'I)

VII. NON-ACTION  
Discussion of FY2020 LUC Commission Officers

VIII. EXECUTIVE SESSION  
The Commission intends to convene an executive session pursuant to HRS Section 92-5(a)(4) to consult with its attorney regarding the Commission's powers, duties, privileges, immunities and liabilities and HRS Section 92-5(a)(2) to consider personnel matters where consideration matters affecting privacy will be involved.

XI. ADJOURNMENT

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 COMMISSIONERS:

3 JONATHAN SCHEUER, Chairperson

NANCY CABRAL, Vice Chair

4 AARON MAHI, Vice Chair

GARY OKUDA

5 EDMUND ACZON

ARNOLD WONG

6 DAWN N.S. CHANG

7 STAFF:

8 RANDALL S. NISHIYAMA, Deputy Attorney General

DANIEL E. ORODENKER, Executive Officer

9 RILEY K. HAKODA, Planner/Chief Clerk

BERT SARUWATARI, Planner

10 RASMI AGRAHARI, Planner

11 DAWN APUNA, ESQ.

Office of Planning, State of Hawai'i

12 RON KIM, ESQ.

13 Deputy Corporation Counsel

DUANE KANUHA, Deputy Planning Director

14 County of Hawai'i

15 A06-770 The Shopoff Group

NOHEA BAPTISTA

16 ROBERT E. LEE, JR.

17 A02-737 U of N Bencorp

KATHERINE GARSON, ESQ.

18 DEREK SIMON, ESQ.

JULIE ANJO, ESQ.

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1 CHAIRPERSON SCHEUER: Aloha mai kakou.  
2 Good morning.

3 This is the May 22nd, 2019 Land Use  
4 Commission Meeting.

5 The first order of business is adoption of  
6 the May 7, 2019 minutes. Are there any corrections  
7 or comments on the minutes?

8 Hearing none. Is there a motion to adopt?

9 VICE CHAIR CABRAL: So moved.

10 CHAIRPERSON SCHEUER: Moved by Commissioner  
11 Cabral.

12 COMMISSIONER WONG: Second.

13 CHAIRPERSON SCHEUER: Second by  
14 Commissioner Wong.

15 Is there any discussion? I will not vote  
16 on these because I recused myself from one portion of  
17 the meeting.

18 All in favor say "aye". Anybody opposed?  
19 Motion passes.

20 The next agenda item is the tentative  
21 meeting schedule. Mr. Orodénker.

22 EXECUTIVE OFFICER: Thank you, Mr. Chair.

23 Tomorrow we will once again be here if  
24 needed.

25 June 5th is also reserved for this matter

1 if needed.

2 June 6th we will be on Oahu for Poma'ikai  
3 Partners site visit. That's an IAL hearing.

4 On June 26th, we have the evidentiary  
5 hearing for Ka'ono'ula Ranch on Maui.

6 On the 27th, we will be back here again for  
7 this matter, the adoption of any orders for Shopoff,  
8 and Puna Quarry request EIS accepting authority.

9 On July 10th, we will be once again here on  
10 this island for the Waikoloa Mauka adoption of order.

11 Thursday the 11th of July will be Poma'ikai  
12 Partners IAL hearing in Honolulu.

13 July 24th is tentative, nothing is  
14 scheduled at this point in time, but ask the  
15 Commissioners to keep that date open.

16 July 25th we will be on Kaua'i for the  
17 Kealia matter.

18 On August 14th and 15th we will be on Oahu  
19 for Commissioner training.

20 August 28th we will be on Oahu for the  
21 Waiawa matter.

22 On August 29th, we will be on Kaua'i for  
23 the Hokua matter.

24 And then September we have a CPO conference  
25 between the 11th and 13th. And the 13th we will be

1 having a meeting for Brewer and McKenna matter status  
2 reports.

3 CHAIRPERSON SCHEUER: Thank you very much.  
4 Are there any questions for our executive  
5 officer?

6 A06-770 The Shopoff Group

7 Our next agenda item is an evidentiary  
8 hearing and action meeting on Docket No. A06-770  
9 Shopoff Group L.P., now Kula Nei, LLC, to consider an  
10 Order to Show Cause as to why approximately  
11 129.99 acres in the North Kona District, County of  
12 Hawai'i, Hawai'i, should not revert to its former  
13 land use designation or be changed to a more  
14 appropriate classification.

15 And I remind you you should press the  
16 button.

17 MS. BAPTISTA: Good morning, Chair and  
18 Commissioners. I'm Nohea Baptista on behalf of Kula  
19 Nei Partners. I'm the daughter of Robert E. Lee, Jr.

20 This is my father, Robert E. Lee, Jr.,  
21 co-manager and owner of Kula Nei Partners.

22 CHAIRPERSON SCHEUER: Mahalo.

23 MR. KIM: Good morning, Chair and  
24 Commissioners, Deputy Corporation Counsel Ron Kim  
25 with County of Hawai'i, and with me is Deputy

1 Director for the Department of Planning, Duane  
2 Kanuha.

3 MS. APUNA: Good morning, Chair, members of  
4 the Commission, Dawn Apuna, Deputy Attorney General  
5 on behalf of the State Office of Planning.

6 CHAIRPERSON SCHEUER: Thank you.

7 Let me now update the record.

8 On March 28, 2019, the Commission met in  
9 Kailua-Kona here at NELHA facility and voted to issue  
10 an Order to Show Cause in this matter.

11 On March 29th, 2019, the Commission mailed  
12 a Notice of Order to Show Cause hearing occurring on  
13 May 22nd, 2019, to the Petitioner and Parties.

14 On April 5th, 2019, a legal notice of the  
15 May 22nd, 2019 meeting was published in the Maui  
16 News, Star-Advertiser, Garden Aisle News, Hawai'i  
17 Herald Tribune and West Hawai'i Today Newspapers and  
18 the Star-Advertiser.com website.

19 Also on April 5, 2019, the Commission  
20 mailed a notice of filing deadlines for the OSC  
21 action to the Petitioner and the Parties.

22 On April 8, 2019, the Commission received  
23 Petitioner's Exhibit List without certificate of  
24 service attached.

25 On May 14, 2019, the Commission received a

1 Stipulation of the Parties from the Office of  
2 Planning.

3 Let me briefly run over our procedure.

4 Is there anybody in the audience who is  
5 desiring to give public testimony on this matter? I  
6 see none. In case anybody comes in, we will provide  
7 for public testimony, and then I'll allow the  
8 Petitioner, followed by County and State Office of  
9 Planning to present their case on the Order to Show  
10 Cause.

11 If the Petitioner wants to, you'll be  
12 allowed to introduce evidence why the Petition Area  
13 should not be reverted to its original classification  
14 if necessary.

15 The Office of Planning and County will also  
16 be allowed to present evidence in support of their  
17 positions.

18 The Petitioner will then be given an  
19 opportunity to give closing arguments.

20 At the conclusion of oral arguments, and  
21 after questions from the Commissioners and the  
22 answers thereto, the Commission will enter formal  
23 deliberations on this matter.

24 Are there any questions for our procedures  
25 this morning?



1 MS. BAPTISTA: No.

2 MR. KIM: No.

3 MS. APUNA: No.

4 CHAIRPERSON SCHEUER: Thank you very much.

5 I also note for the parties and the public  
6 that from time to time I'll call for short breaks.

7 And for those who may not have been in  
8 front of us before, I'll briefly note that we are  
9 nine members, currently eight. We're in the process  
10 of appointing a commissioner from Kaua'i. We all  
11 serve as volunteers appointed by the governor,  
12 confirmed by the senate.

13 You can look on-line at our financial  
14 disclosures, if you wish to. We do this to try and  
15 help Hawai'i.

16 Last check, anybody desiring to give public  
17 testimony?

18 With that then, Ms. Baptista, Mr. Lee, you  
19 can proceed with your presentation.

20 MS. BAPTISTA: We are here today regarding  
21 the Order to Show Cause as issued to us by the Land  
22 Use Commission by letter dated March 29, 2019  
23 regarding Docket A06-770 The Shopoff Group. We are  
24 here as the Successor Petitioners.

25 As stated to the Commission during our

1 previous status update on March 28th, we maintain our  
2 position regarding the conditions attached to the  
3 land due to the current urban zoning and our  
4 inability to comply with those conditions.

5 We humbly request the Commission revert the  
6 land back to its original or more appropriate  
7 classification removing the D&O conditions and  
8 allowing us to move forward with our plans to develop  
9 a low density ohana-style subdivision.

10 I believe everyone received a copy of the  
11 declaration and the exhibits that are attached. As  
12 you read through the declaration, I think it kind of  
13 explains what it is that we're trying to do.

14 And if you look at the exhibits that we  
15 also included, you will see specifically the  
16 archaeological inventory surveys Exhibit 2, 3 and 4,  
17 why we are trying to move forward with the project  
18 the way we are instead of the way Shopoff Group  
19 presented.

20 We do intend to protect the archaeological  
21 sites in place. We want to create a rural community  
22 much smaller than what was originally planned. We  
23 want to have a place where families can come and grow  
24 up together in a community that's safe within the  
25 community, where we can get back to the old-style

1 values. Where you knew your neighbors. Where  
2 everybody took care for one another, but at the same  
3 time, we don't want to disrupt anything that was  
4 there from the past. We want to move forward to the  
5 future respecting the past.

6 I believe that's all we have to really say.

7 CHAIRPERSON SCHEUER: Thank you.

8 Are there any questions for the Petitioner  
9 from the Commission? Commissioner Chang.

10 COMMISSIONER CHANG: Good morning, Ms.  
11 Baptista. Thank you so much, both of you, for being  
12 here.

13 I was not at the last hearing, but I did  
14 read the transcript. I just wanted to confirm that  
15 based upon what you're proposing to do, is it your  
16 understanding that you'll be able to do the  
17 low-density ohana development on the ag, if it  
18 reverts back, that you'll be able to do what you're  
19 proposing to do on the ag designation?

20 MS. BAPTISTA: We are working on a  
21 planned-unit development. We're hoping that through  
22 that we can get lots, if not all, five acres  
23 hopefully down to two acres, giving people land, an  
24 area. But everything will be designed around  
25 allowing those archaeological sites that are already

1 in place to stay where they are.

2 COMMISSIONER CHANG: Mahalo for doing that.  
3 Really mahalo for taking on that kuleana to preserve  
4 all those sites.

5 So you've been working with the County of  
6 Hawai'i on the PUD?

7 MS. BAPTISTA: Yes. We have a designer  
8 that's been helping us. We found out our plans were  
9 not complete, so was kind of a blessing for us,  
10 because when we came back we could kind of change  
11 some of the concepts that we wanted to do.

12 So we have a conceptual, and it's very  
13 close but it's not complete yet to the point where I  
14 would feel comfortable in bringing it to the  
15 Commission and saying this is exactly what we are  
16 going to do, but we are close.

17 CHAIRPERSON SCHEUER: Are there further  
18 questions for the Petitioner at this time?

19 Commissioner Cabral.

20 VICE CHAIR CABRAL: Thank you again for  
21 appearing and with your wonderful plans.

22 You gave some information here on things  
23 are moving forward. Do you have any kind of  
24 timetable on when you're going to be ready to move  
25 ahead with any actual onsite activity?

1 MS. BAPTISTA: We just got back our  
2 cultural survey from archaeologists that was required  
3 for the planned-unit development. So I think we're  
4 just about done with completing our PUD now that we  
5 have received that back from him. There is a couple  
6 changes that we are going to have to make, real  
7 minor. So I think we will be moving forward as soon  
8 as we can get the area reclassified.

9 VICE CHAIR CABRAL: Thank you.

10 MS. BAPTISTA: Could I just add one thing?

11 For us, the importance of reclassifying, we  
12 could do what we were wanting to do without the  
13 conditions in an urban setting. Our concern though  
14 is that we have an idea of what we want to do and  
15 it's preservation.

16 20 years from now, some of us may be gone,  
17 and if the land was to stay in urban, we can't  
18 protect those sites the way we can right now.

19 We want to make sure that going forward,  
20 the concept of Kula Nei stays intact.

21 VICE CHAIR CABRAL: Thank you.

22 CHAIRPERSON SCHEUER: Any other questions  
23 for now?

24 Commissioner Okuda.

25 COMMISSIONER OKUDA: Thank you, Mr. Chair.

1           Ms. Baptista, I know at the last hearing  
2   you gave a little bit of background of your family's  
3   connection to the property. The declaration, you  
4   know, states your grandparents' connection. But just  
5   so we can hear it and evaluate, hear it from you  
6   again, I think it's important if you can just give us  
7   a short description or summary of your family's  
8   connection to the land, and why the land is so  
9   important to your family, and maybe to you  
10 personally.

11           MS. BAPTISTA: So the land was formerly  
12 owned by my great grandparents, my father's  
13 grandparents, and bought it from the Territory of  
14 Hawai'i in 1920's.

15           They lived on the land. They farmed the  
16 area. Raised cattle, sweet potato, those types of  
17 things.

18           When they passed, it moved onto another  
19 family member who eventually did sell it to the  
20 Shopoff Group. My tutu, Elizabeth Lee, she raised us  
21 and lived with us for the last 15 years, maybe  
22 16 years of her life.

23           But she would explain to my dad what would  
24 happen in the area, what they would do. The fact  
25 that they would grow crops there, and then walk all

1 the way down, follow the trail down to the ocean, and  
2 you know, her father would go fish and come back up.

3 And I don't know if we mentioned the story  
4 the last time here. The story that she would tell us  
5 about him walking down to the ocean and coming back  
6 with his fish bag, and the fish were still alive in  
7 the bag. And there was a process where you put the  
8 limu inside, and it allowed the fish to stay  
9 breathing until he got back up to the property, fresh  
10 fish. He was on a horse or a donkey, not really  
11 sure.

12 MR. LEE: He was one of the few people in  
13 the area that had a horse and a mule. So he would  
14 get up 4:00 o'clock in the morning, get on a horse  
15 and be back by 10:00 o'clock with the eke full of  
16 fish. And along the way back up, what would happen  
17 is, neighbors could hear the horse coming up the  
18 trail, so everybody would be on the stonewall like  
19 this (indicating) waiting. And by the time he got  
20 home, the bag was half gone.

21 So my tutu Haleaka would go, "what  
22 happened?" And he would tell her, "well, coming up  
23 the trail, people asked me for some, so had to give  
24 'em." So my tutu said, "Okay, one new trail  
25 tomorrow" so bypass all those people.

1           I asked my mom. I said, "wait a minute.  
2   The fish was still breathing?" And she said, "yeah,"  
3   I said "that's impossible. Fish going be dead couple  
4   hours on the trail." She goes, "No. Tutu man put it  
5   inside a bag and choked it with limu, and when they  
6   came home, the fish was still alive." Fresh fish.

7           MS. BAPTISTA: That kind of gives you a  
8   general idea of what we are trying to create in that  
9   community. The fact that he would come home and have  
10   half his fish would be gone is exactly the kind of  
11   community we want to create at Kula Nei. Old rural  
12   style community where you go on vacation and you know  
13   your neighbors will watch your house. Where your  
14   kids play outside and you don't have to worry.

15           My children -- we live on the property with  
16   my father. My kids are outside until 7:00 o'clock at  
17   night and I have to scream out my window for them to  
18   come back.

19           But there is just a sense of home and  
20   safety and it gives that opportunity to have roots in  
21   your area.

22           CHAIRPERSON SCHEUER: Mahalo.

23           Is there anything further at this time for  
24   the Petitioner? We will have one more bite at this  
25   apple.



1           If not, County of Hawai'i.

2           MR. KIM: Mr. Kanuha had some other  
3 comments on the stipulation.

4           CHAIRPERSON SCHEUER: I believe I have to  
5 swear you in.

6           Do you swear or the affirm that the  
7 testimony you're about to give is the truth?

8           THE WITNESS: I do.

9           CHAIRPERSON SCHEUER: Please proceed.

10                           DUANE KANUHA  
11 Was called as a witness by and on behalf of the  
12 County of Hawai'i, was sworn to tell the truth, was  
13 examined and testified as follows:

14                           DIRECT EXAMINATION

15           THE WITNESS: Thank you. Mr. Chairman and  
16 members of the Commission, my name is Duane Kanuha,  
17 Deputy Planning Director.

18           As you all know, the parties have reached a  
19 stipulation on this matter.

20           And what I wanted to comment on is, during  
21 the last meeting, there was some questions related to  
22 what kind of stipulation the county would support.  
23 And I believe at that meeting the discussion was a  
24 reversion back to rural instead of agriculture, which  
25 is what the final stipulation has, what we have

1       agreed upon in the final stipulation.

2               The county was supporting the concept of  
3       rural mainly because we felt that this property would  
4       be a transition area between some of the urban  
5       designated properties that are -- (indecipherable,  
6       coughing) -- and because our general plans, our  
7       community development plans talk about this area  
8       going into urban expansion.

9               However, as I look at the zoning map today,  
10       and I look at the communities today, this particular  
11       property is actually surrounded by agricultural  
12       one-acre subdivision, family agriculture two-acre  
13       subdivision, agriculture five-acre subdivision, and  
14       agriculture three-acre subdivision. That's the  
15       zoning characteristics of the property that surrounds  
16       this Petition Area.

17               Many of these subdivisions are old  
18       subdivisions. They have been in existence for a long  
19       time. They're fully occupied by residents. And so  
20       from that standpoint, I think we had difficulty  
21       envisioning that at some point in time these  
22       subdivisions would be converted, rolled over into the  
23       more urban environment.

24               And it's for that reason that after  
25       discussions with the State and the Petitioner, we

1 agreed to stipulate that we would support this  
2 reversion from the State Land Use Urban District into  
3 the Agricultural District rather than the Rural.  
4 Thank you.

5 CHAIRPERSON SCHEUER: Thank you very much.

6 Are there any questions for the County's  
7 witness from the Petitioner?

8 Because the County has called a witness,  
9 I'll let the parties first ask questions.

10 MS. BAPTISTA: No questions.

11 CHAIRPERSON SCHEUER: Office of Planning?

12 MS. APUNA: No questions.

13 CHAIRPERSON SCHEUER: Commissioners?

14 Commissioner Chang.

15 COMMISSIONER CHANG: Thank you, Mr. Kanuha  
16 for your testimony.

17 Two questions:

18 One, under the lease they're proposing  
19 under their PUD, are they allowed to do that under an  
20 ag classification?

21 THE WITNESS: Yes, they are. The process  
22 that we have in the County is this Planned-unit  
23 Development process. And essentially what it allows  
24 a person to do is to -- more flexibility in  
25 configurations of either properties, or if it's a

1 vertical development, you know, setbacks, heights,  
2 things of that nature.

3 In this particular property, given that  
4 they have, you know, a certain number of water  
5 commitments already based on the agricultural  
6 five-acre zoning here, they could come in with a PUD,  
7 which would allow a clustering of the density. In  
8 other words, kind of like a density transfer.

9 And based on the amount of sites that are  
10 on one of the properties, my understanding is their  
11 intent is to transfer the development density for  
12 that property onto the two mauka properties. And at  
13 the same time, you can reduce the lot sizes, as long  
14 as you don't increase the density. So you only have  
15 so many lots.

16 And if it's transferring the ability to use  
17 those lots from one property to another, right, then  
18 we'll allow that additional density, additional  
19 transfer of lots just because the lots get smaller.

20 COMMISSIONER CHANG: It's my understanding,  
21 should the property be reverted, it will no longer be  
22 under the Land Use Commission's jurisdiction.

23 THE WITNESS: Uh-huh.

24 COMMISSIONER CHANG: So all zoning  
25 requirements, all conditions, they would work with

1 the County on that?

2 THE WITNESS: Correct.

3 COMMISSIONER CHANG: This is a question for  
4 Mr. Kim.

5 As I was reading through the transcripts,  
6 that was -- the County's position was to change it to  
7 rural. So is it your legal opinion that under  
8 205-4(g) that the LUC has the authority, not only to  
9 revert, but to change to a more appropriate zoning,  
10 which in the case that you were raising would be  
11 rural?

12 MR. KIM: Yes, that is my read of the  
13 statute.

14 COMMISSIONER CHANG: Thank you very much.  
15 I have no further questions.

16 CHAIRPERSON SCHEUER: Are there more  
17 questions for Mr. Kanuha from the Commission?

18 Do you have anything further, County?

19 MR. KIM: No. Thank you, Chair.

20 CHAIRPERSON SCHEUER: Office of Planning.

21 MS. APUNA: Thank you, Chair.

22 OP joins in the stipulation that was filed  
23 with the Commission on May 14, 2019, among Successor  
24 Petitioner Kula Nei Partners, LLC and the County of  
25 Hawai'i to revert the subject Petition Area.

1           The stipulation provides that the parties  
2 are not aware of any compliance with the D&O  
3 representations and conditions by the Original  
4 Petitioner, The Shopoff Group, and that Kula Nei  
5 Partners has not and does not intend to comply with  
6 the D&O representations and conditions.

7           The parties agree that there has been no  
8 substantial commencement or substantial progress in  
9 developing the Petition Area by the Original  
10 Petitioner or Kula Nei Partners.

11          The Parties agree that the Petition Area  
12 will revert to the former agricultural state land use  
13 classification, and that Kula Nei Partners will no  
14 longer be subject to the D&O conditions.

15          OP appreciates the cooperative efforts of  
16 the Parties. Thank you.

17          CHAIRPERSON SCHEUER: Are there questions  
18 from the Commissioners for the Office Of planning?

19          If I may, I understand the stipulation, I  
20 understand what you just said is that you agree that  
21 the land could be reverted to its former agricultural  
22 land use designation?

23          MS. APUNA: To agriculture.

24          And I would just add that as far as OP's  
25 position on reclassification to a more appropriate

1 classification, we would probably have problems with  
2 that as far as -- because it's a new classification  
3 that wasn't vetted, to revert is just to go back to  
4 what was originally there; whereas, if we went to  
5 rural, OP doesn't have the same ability to review  
6 what would happen as a rural classification.

7           If that makes sense. I know the law says  
8 you can reclassify, but I think procedurally or  
9 policy-wise even, it's hard for OP to say just go to  
10 rural without having vetted it in a way that we would  
11 normally view for an amendment or for a boundary  
12 amendment or motion to amend.

13           CHAIRPERSON SCHEUER: Do you -- please  
14 continue.

15           MS. APUNA: Just one more thing.

16           I think when we were discussing it with the  
17 parties and Petitioner, what we mentioned an option  
18 might be to just do a motion to amend and maybe get  
19 rural in that way, and then that would create the  
20 process where OP and County might be able to vet  
21 more.

22           But I know that they have different plans  
23 or they have different priorities, so I think OP just  
24 feels better about just reversion, going back to the  
25 original classification.

1 CHAIRPERSON SCHEUER: So I'm trying to be  
2 clear in my mind, forgive me if I have somehow  
3 misunderstood.

4 The parties have all stipulated to  
5 reversion to agricultural district rather than rural?

6 MS. APUNA: Yes.

7 MS. BAPTISTA: Yes.

8 MR. KIM: Yes.

9 CHAIRPERSON SCHEUER: Thank you.

10 The last thing was I going to say, Ms.  
11 Apuna, would you believe it's perhaps akin to the IAL  
12 procedures in the Land Use Commission Statute 205,  
13 say that a certain amount of land could be  
14 transferred upon the granting of an IAL petition into  
15 the Urban District, but there's no procedures  
16 attached with that process, so it's not clear how we  
17 would actually go about doing that in the same case  
18 when the law says it goes back to a more appropriate  
19 jurisdiction if that's not a full reversion to the  
20 prior jurisdiction, the procedural ability for the  
21 LUC to fulfill its duties to protect the public trust  
22 interest is not obviously there; is that correct?

23 MS. APUNA: Yes, I believe that.

24 CHAIRPERSON SCHEUER: Is there anything  
25 else for Office of Planning?



1 Commissioner Cabral.

2 VICE CHAIR CABRAL: I'm ready to make a  
3 motion.

4 CHAIRPERSON SCHEUER: Hold on. We want to  
5 give the Petitioner a last chance to rebut any final  
6 questions from all of the Commissioners just so we're  
7 super clear -- clean on procedures.

8 Would you like to say anything more,  
9 Petitioner?

10 MS. BAPTISTA: I think we're pretty set. I  
11 just did want to bring up, because Ms. Chang wasn't  
12 here the last time, if you look at Exhibit 3, that's  
13 the most makai portion -- I'm sorry, is it three --  
14 I'm sorry Exhibit 2, survey of the archaeology on  
15 that lower portion of the property.

16 And as you can see it's covered with  
17 archaeological sites. So it is our intention just to  
18 only develop maybe a small portion in the corner to  
19 put a center, some kind of learning center, not sure  
20 yet, something to do with lauhala, something to do  
21 with agriculture, maybe trying to repopulate the  
22 endemic plants that are there, something along those  
23 lines.

24 But we do want to protect it because this  
25 is our kuleana to keep it safe as lineal descendants.

1 COMMISSIONER CHANG: I'll tell you, as a  
2 Hawaiian, I really appreciate what you're doing as a  
3 family. So much of our ancestral lands, Hawaiians  
4 don't have the ability to do that, so I really mahalo  
5 what you're doing and the opportunity that you had to  
6 get the land back and to malama. So thank you very  
7 much.

8 MS. BAPTISTA: I think that's it for us.  
9 We just would like to see, again, Kula Nei for us a  
10 place where people can plan their future, still stay  
11 connected to their past.

12 CHAIRPERSON SCHEUER: Mahalo.

13 Nothing further from the County or Office  
14 of Planning? No concluding arguments?

15 MR. KIM: No, thank you.

16 CHAIRPERSON SCHEUER: Commissioners, we  
17 need a motion for the Commission to accept the  
18 presented evidence, position statements, and  
19 stipulation by the Parties to conclude the  
20 evidentiary portion of this hearing.

21 VICE CHAIR CABRAL: So moved.

22 CHAIRPERSON SCHEUER: Moved by Commissioner  
23 Cabral.

24 Is there a second? Seconded by  
25 Commissioner Aczon.

1           Is there any discussion of this motion  
2       which is to conclude the evidentiary portion of the  
3       hearing?

4           Mr. Orodenker, do we need a roll call or  
5       can we do voice --

6           EXECUTIVE OFFICER:   Better to do roll call.

7           CHAIRPERSON SCHEUER:   Please do a roll  
8       call.

9           EXECUTIVE OFFICER:   Thank you, Mr. Chair.

10          CHAIRPERSON SCHEUER:   This is a motion on  
11       accepting the presented evidence statements and  
12       concluding the evidentiary portion.

13          EXECUTIVE OFFICER:   Sorry, I was jumping  
14       ahead.

15          Motion made to accept the presented  
16       evidence, position statements and stipulations by the  
17       parties and to conclude the evidentiary portion of  
18       this hearing.

19          Commissioner Aczon?

20          COMMISSIONER ACZON:   Aye.

21          EXECUTIVE OFFICER:   Commissioner Cabral?

22          VICE CHAIR CABRAL:   Yes.

23          EXECUTIVE OFFICER:   Commissioner Mahi?

24          COMMISSIONER MAHI:   Aye.

25          EXECUTIVE OFFICER:   Chair Scheuer?

1           CHAIRPERSON SCHEUER:   Aye.

2           EXECUTIVE OFFICER:   Commissioner Chang?

3           COMMISSIONER CHANG:   Yes.

4           EXECUTIVE OFFICER:   Commissioner Okuda?

5           COMMISSIONER OKUDA:   Yes.

6           EXECUTIVE OFFICER:   Commissioner Wong?

7           COMMISSIONER WONG:   Aye.

8           CHAIRPERSON SCHEUER:   Thank you.

9           So now we can conduct formal deliberations  
10       on this matter concerning whether or not the  
11       Commission has reason to believe there has been a  
12       violation of the Decision and Order, and the  
13       Commission should order the Petitioner to show cause  
14       why the Petition Area should not be reverted to its  
15       former land use classification or to a more  
16       appropriate classification.

17                I would note for the parties and for the  
18       public that during the Commission's deliberations,  
19       I'm not going to entertain any additional input from  
20       the parties unless any individual Commissioners have  
21       a specific question.

22                Commissioners, let me first next confirm  
23       with you that each have reviewed the record and read  
24       the transcripts for any meeting you may have missed  
25       and are prepared to deliberate on the subject docket.

1           After I call your name, will you please  
2 signify with either "aye" or "nay" that you're  
3 prepared to deliberate on this matter.

4           Commissioner Aczon?

5           COMMISSIONER ACZON:   Aye.

6           CHAIRPERSON SCHEUER:   Commissioner Chang?

7           COMMISSIONER CHANG:   Aye.

8           CHAIRPERSON SCHEUER:   Commissioner Mahi?

9           COMMISSIONER MAHI:   Aye.

10          CHAIRPERSON SCHEUER:   Commissioner Cabral?

11          VICE CHAIR CABRAL:    Yes.

12          CHAIRPERSON SCHEUER:   Commissioner Wong?

13          COMMISSIONER WONG:    Yes.

14          CHAIRPERSON SCHEUER:   And the Chair is also  
15 prepared to deliberate on this matter.

16          Commissioner Okuda?

17          COMMISSIONER OKUDA:   Yes.

18          CHAIRPERSON SCHEUER:   Kala mai.   Much like  
19 a newscaster, sometimes I just read what's put in  
20 front of me at meetings.

21                 So our goal today now is to determine, by  
22 way of motion, the Commission's decision on whether  
23 or not there has been a violation of the Decision and  
24 Order and the Petitioner has failed to perform  
25 according to the representations made in seeking the

1 land use reclassification, and whether or not to  
2 revert property to former land use classification or  
3 to a more appropriate classification.

4 Commissioners, what is your pleasure?

5 Commissioner Cabral.

6 VICE CHAIR CABRAL: I would like to thank  
7 the family also for their efforts to do the right  
8 thing. And I'm sure it will be very expensive and  
9 very hard, and I would love to think that all the  
10 wonderful people in our community will support you in  
11 this and be good citizens for your efforts.

12 And I would like to hope that the County  
13 will work with you in your zoning needs into the  
14 future.

15 CHAIRPERSON SCHEUER: Commissioner, would  
16 you make a motion and then you can speak in favor of  
17 it?

18 VICE CHAIR CABRAL: Thank you. You might  
19 take the phone away from me.

20 I would like to move to revert the land use  
21 classification of the Petition Area from the State  
22 Land Use Urban District to the State Land Use  
23 Agricultural District.

24 COMMISSIONER ACZON: Second.

25 CHAIRPERSON SCHEUER: A motion has been

1 made by Commissioner Cabral and seconded by  
2 Commissioner Aczon.

3 Commissioner Cabral, do you have anything  
4 further to say?

5 VICE CHAIR CABRAL: Good luck.

6 CHAIRPERSON SCHEUER: Commissioners, we are  
7 in deliberation with the motion in front of us.

8 Commissioner Chang.

9 COMMISSIONER CHANG: I would like to  
10 clarify, Commissioner Cabral.

11 Is your motion, is it to find that the  
12 Petitioner has not complied with the conditions, or  
13 is it just to revert?

14 VICE CHAIR CABRAL: Well, it would include  
15 that they haven't complied, but I was trying to keep  
16 everything on a really positive note and say we are  
17 going to convert, because everybody is in agreement,  
18 so I don't think that my motion would require that  
19 they be noted as to not complying.

20 To me that was a negative concept, instead  
21 they are rising to a greater higher level, instead of  
22 reverting to a lower level in the Land Use hearing.

23 COMMISSIONER CHANG: Thank you so much for  
24 your clarification.

25 Based upon that, Chair, I would like to

1 make a motion to go into executive session to consult  
2 with the Board's attorney on questions and issues  
3 pertaining to the Board's powers, duties, privileges  
4 immunities -- why can't I do that?

5 CHAIRPERSON SCHEUER: One moment. We're  
6 going to take a one-minute recess.

7 (Recess taken.)

8 CHAIRPERSON SCHEUER: We are back on the  
9 record.

10 Commissioner Chang, is there a specific  
11 reason for going into executive session?

12 COMMISSIONER CHANG: Yes. I would like --  
13 as a matter of procedure, do we have to determine  
14 that under 205-4 that there's been noncompliance, or  
15 can we just agree to accept the stipulation of the  
16 parties?

17 Because I feel the same way as Commissioner  
18 Cabral, that it's not because they violated, they  
19 made an agreement. They decided to revert the  
20 property. But procedurally, do we have to go through  
21 that finding?

22 CHAIRPERSON SCHEUER: We normally don't  
23 take up motions to go into executive session while  
24 we're in formal deliberation, which is partially why  
25 I'm trying to appropriately navigate us through this



1 discussion.

2 I believe your discussion point, if I may  
3 directly respond to you, Commissioner Chang, with  
4 your forbearance before calling for an executive  
5 session.

6 The parties have stipulated to a motion.  
7 In that stipulation, I believe there was an  
8 acknowledgment that there has been noncompliance, and  
9 there's no intent to comply with the former  
10 conditions because there's no desire to have the land  
11 remain in the Urban District.

12 So the motion and the discussion can  
13 certainly reflect that we are accepting the  
14 stipulation of the parties in this matter, which  
15 addresses those.

16 Would that be responsive, or would you  
17 still like to go into executive session to discuss  
18 this procedural matter?

19 COMMISSIONER CHANG: It's not a substantive  
20 question for me, it's a procedural question whether,  
21 as a matter of law, we are required to make a  
22 specific finding to do the reversion, or can we just  
23 accept the stipulation, because I think the motion is  
24 different?

25 CHAIRPERSON SCHEUER: Is there a second to

1 the motion to go into execute session? Is there a  
2 second to the motion to go into executive session?

3 So the motion does not move forward.

4 Did you have something further you wanted  
5 to say on this matter, Commissioner Chang?

6 COMMISSIONER CHANG: No.

7 CHAIRPERSON SCHEUER: Commissioner Okuda,  
8 followed by Commissioner Aczon.

9 COMMISSIONER OKUDA: Mr. Chair, if I can  
10 speak in favor of the motion, and first of all, to  
11 the extent necessary, let me apologize to the  
12 Petitioners and anyone else who might be offended by  
13 the title of the motion or the words used in the  
14 motion. It's not intended to be negative or  
15 pejorative or talk stink about anyone.

16 Sometimes we have to make these statements  
17 just to put the pegs in the slots that the law  
18 requires us to do.

19 One of the reasons why I don't believe the  
20 title should be deemed or viewed to be anything  
21 negative to the Petitioner's family is the conditions  
22 run with the land. In other words, it's a condition  
23 that's attached to the land, and it was attached  
24 because, as I heard the evidence, some predecessor  
25 party attached those conditions to the land.

1           We recognize, I believe, or at least I do,  
2           that the Petitioners that are here today are not the  
3           same people that attached the conditions to the land.

4           So I would, in making this decision,  
5           include the fact that I would find that there were  
6           these conditions, and the conditions been met, but in  
7           no way would that finding be considered anything  
8           negative or pejorative or to cast any aspersions or  
9           doubts on the Petitioner.

10          The one comment I would like to make,  
11          because I do agree with the sentiment that's being  
12          raised here, that the Petitioner should be  
13          complimented as far as what they're doing. And I  
14          know my fellow Commissioner and lawyer friend,  
15          Commissioner Chang said it's also good from a  
16          Hawaiian perspective.

17          But I would like to make just one point so  
18          that we understand that. I believe what the  
19          Petitioners are doing are in the spirit of the Public  
20          Trust Doctrine, and the constitutional provisions  
21          that spelled that out in the Hawai'i Constitution as  
22          far as preservation and development of Hawaii's  
23          resources and beauty with the eye towards  
24          conservation and self-sufficiency, and also the  
25          constitutional provision of the recognition and duty

1 to preserve Native Hawaiian cultural, not only  
2 values, but resources.

3 And it's important, I believe, to make a  
4 statement. These are not Hawaiian only goals. They  
5 come out of the 1978 constitution. And I think I  
6 know a little bit about that constitutional  
7 convention because I worked on staff at the  
8 constitutional convention before I went off to law  
9 school on the mainland.

10 Some people tell me there were seven Native  
11 Hawaiian delegates at the constitutional convention.  
12 I frankly can't remember more than four.

13 So the provisions in the constitution which  
14 speak of the duty to preserve and develop Hawai'i's  
15 resources with an eye on conservation,  
16 self-sufficiency and preservation of Native Hawaiian  
17 cultural resources, it's not simply a Hawaiian thing,  
18 it's a provision that delegates that crossed ethnic  
19 lines, neighborhoods, occupations, different  
20 background all voted and decided, reflect the common  
21 goals and objectives of the community.

22 So for those reasons and other good reasons  
23 in the record, my inclination is to support the  
24 motion. Thank you.

25 CHAIRPERSON SCHEUER: Commissioners,

1 further deliberations? Commissioner Aczon.

2 COMMISSIONER ACZON: I really appreciate  
3 the goals of the Petitioner, but for us, sometimes we  
4 have to make things on the record to make sure we're  
5 covered. So I'll be a bad guy in this one.

6 I would support the motion to revert the  
7 property for the following reasons:

8 There has been a lack of substantial  
9 commencement, abuse of the Petition Area in  
10 accordance with the representations made to the  
11 Commission; and second, there has been a failure to  
12 perform or comply according to the conditions,  
13 representations and the events of the Decision and  
14 Order.

15 I want to put that in the record. Thank  
16 you.

17 CHAIRPERSON SCHEUER: Thank you,  
18 Commissioner Aczon.

19 Anything further, Commissioners? If not, I  
20 will very briefly just say a few remarks.

21 First, to thank you for invoking the name  
22 of your grandmother into this room; all that she did  
23 for this area.

24 I want to very briefly address the issues  
25 that were brought up about whether there is a

1 negative or positive connotation with noncompliance,  
2 because as we sit here in our quasi-judicial rolls,  
3 there's not like, oh, you're bad, or oh, you're good,  
4 based on what you're doing.

5 It's really a matter of law applied to  
6 facts. I'm very happy the parties stipulated. I'm  
7 supportive of the stipulation. But it is a  
8 factual -- promises were made by the previous owner  
9 of the land, and conditions were agreed to, and those  
10 have not been complied with.

11 The last thing I want to do is just to  
12 thank you for you appearing without attorneys, but  
13 just being honest and straight forward, no procedural  
14 fancy work or anything to try to get through. Just  
15 come to us as we are volunteers, and you're a family  
16 trying to take care for your property, straight  
17 forward like, "hey, how do you we get through this  
18 together?"

19 That respect for our time and process is  
20 very gratefully appreciated. For all those reasons,  
21 I intend to vote in support.

22 Mr. Orodenger, please poll the Commission.

23 EXECUTIVE OFFICER: Thank you, Mr. Chair.

24 The motion is to revert the property to its  
25 prior classification.

1 Commissioner Cabral?

2 VICE CHAIR CABRAL: Yes.

3 EXECUTIVE OFFICER: Commissioner Aczon?

4 COMMISSIONER ACZON: Aye.

5 EXECUTIVE OFFICER: Commissioner Mahi?

6 COMMISSIONER MAHI: Aye.

7 EXECUTIVE OFFICER: Commissioner Chang?

8 COMMISSIONER CHANG: Yes.

9 EXECUTIVE OFFICER: Commissioner Okuda?

10 COMMISSIONER OKUDA: Yes.

11 EXECUTIVE OFFICER: Commissioner Wong?

12 COMMISSIONER WONG: Aye.

13 EXECUTIVE OFFICER: Chair Scheuer?

14 CHAIRPERSON SCHEUER: Aye.

15 EXECUTIVE OFFICER: Mr. Chair, the motion

16 passes.

17 CHAIRPERSON SCHEUER: Thank you very much.

18 Congratulations. We will now take a five-minute

19 recess.

20 (Recess taken.)

21 A02-737 University of Nations

22 We are back on the record.

23 Our next agenda item is an action meeting

24 on Docket No. A02-737, University of Nations' Motion

25 to Rescind the Order to Show Cause, or to continue

1 the hearing on an Order to Show Cause.

2 Will the Parties please identify themselves  
3 for the record?

4 MS. GARSON: Katherine Garson and Derek  
5 Simon from Carlsmith for University of Nations Kona.

6 To my right is Julia Anjo, she's general  
7 counsel for University of Nations.

8 MR. KIM: Good morning, Chair,  
9 Commissioners, Deputy Corporation Counsel Ron Kim on  
10 behalf of County of Hawai'i, and with me is Deputy  
11 Director Planning Department, Duane Kanuha.

12 MS. APUNA: Good morning, Chair, members of  
13 the Commission. Deputy Attorney General, Dawn Apuna  
14 on behalf of Office of Planning.

15 CHAIRPERSON SCHEUER: Let me now update the  
16 record.

17 March 28, 2019, the Commission met here in  
18 Kailua-Kona at the NELHA facility and voted to issue  
19 an Order to Show Cause in this matter. At that  
20 meeting the Petitioner submitted:

21 Annual Report for 2019

22 PowerPoint entitled YWAM Kona PowerPoint

23 Board minutes

24 Letter Accepting Preservation Plan of 2014

25 Preservation 2013



1 Archaeological Data Recover at ten sites

2 On March 29, 2019, the Commission mailed  
3 out a Notice of Order to Show Cause hearing occurring  
4 on May 22, 2019 to Petitioner and Parties.

5 On April 5th, a legal notice of the May  
6 22nd meeting was published in the Maui News,  
7 Star-Advertiser, Garden Isle News, Hawai'i Herald  
8 Tribune and West Hawai'i Today Newspapers and  
9 Star-Advertiser.com website.

10 Also on April 5, 2019, the Commission  
11 mailed a notice of filing deadlines for the OSC  
12 action to the Petitioner and the Parties.

13 On April 26th, 2019, the Commission  
14 received Petitioner's Exhibit and Witness Lists for  
15 the May 22, 2019 hearing; and OP's Statement of  
16 Position.

17 On May 1st, 2019, the Commission received  
18 Petitioner's Notice of Representation of Counsel and  
19 Change in Ownership of Petition Area and Exhibits 1,  
20 2a, 2b, 3a, and 3b.

21 On May 3rd, 2019, the Commission received  
22 the University of the Nations, Kona, Inc.'s Rebuttal  
23 List of Exhibits and Rebuttal List of Witnesses; and  
24 University of the Nations, Kona, Inc.'s Statement of  
25 Position and Rebuttal to the Statement of Position of

1 the Office of Planning on the Order to Show Cause  
2 Issued by the State of Hawai'i Land Use Commission on  
3 March 29, 2019; Exhibits "19" - "28B".

4 On May 8, 2019, the Commission received  
5 University of the Nations, Kona, Inc.'s Motion to  
6 Rescind Order to Show Cause or to Continue Hearing on  
7 Order to Show Cause.

8 On May 13, 2019, an LUC meeting agenda  
9 notice for May 22nd-23rd meeting was sent to the  
10 Parties and Statewide and County of Hawai'i mailing  
11 lists.

12 On May 15th, the Commission received OP's  
13 response to the Motion to Rescind Order to Show Cause  
14 or to Continue Hearing on Order to Show Cause;  
15 Exhibit "A".

16 On May 17th, the Commission received the  
17 following docket: Petitioner University of Nations,  
18 Kona's Notice of Appearance of Counsel-Julie and  
19 Allen Anjo co-counsel; Stipulation Extending time for  
20 University of Nations, Kona, Inc., to file  
21 supplemental exhibits; First Supplemental List of  
22 Exhibits; Exhibits 29-33.

23 On May 20th, the Commission received the  
24 Statement of Position of the County of Hawai'i  
25 Planning Department on the LUC's Order to Show Cause.

1           Also on the same date, the Commission  
2       received U of N, Op and County of Hawai'i Joint  
3       Stipulation to Stay Hearing on Order to Show Cause  
4       and Reservation of Rights.

5           Let me now briefly go over our procedures.

6           First, I will call for those desiring to  
7       provide public testimony on this motion to identify  
8       themselves. By the size of the audience, are there  
9       people intending to provide public testimony in this  
10      matter? I saw nodding heads.

11          Individuals will be called up to the  
12      witness box, which I just gestured to with my right  
13      hand. I will then swear you in, ask you to state  
14      your name and address for the record prior to giving  
15      you testimony.

16          Depending on how many people are planning  
17      to give testimony, I will reserve the right to limit  
18      the time allowed for testimony.

19          After that we will then begin the  
20      proceedings on the motion starting with Petitioner  
21      presenting its case, followed by County Planning  
22      Department and the State Office of Planning.

23          The Petitioner may reserve a portion of  
24      their time to respond to comments made by the County  
25      and the State Office of Planning.

1 Any questions on our procedures for today?

2 MS. GARSON: No.

3 MR. KIM: No.

4 MS. APUNA: No.

5 CHAIRPERSON SCHEUER: Individuals desiring  
6 to give public testimony, is there more than one?  
7 Just one right now.

8 Are there any individuals desiring to give  
9 public testimony today? I see none.

10 So there is no public testimony. I'm going  
11 to close that portion of the proceedings.

12 Ms. Garson, before you proceed with your  
13 case, I'm going to ask a question.

14 Late Monday afternoon, we received a  
15 stipulation with regard to this matter.

16 MS. GARSON: Yes.

17 CHAIRPERSON SCHEUER: Is there anything  
18 else you're withholding from the Commission at this  
19 time?

20 MS. GARSON: No. You're talking about the  
21 stipulation between the State of Hawai'i Office of  
22 Planning?

23 CHAIRPERSON SCHEUER: That is correct. We  
24 became aware of the stipulation prior to it actually  
25 be being filed with us. Anything else that's been

1 prepared that we have not received that you're  
2 planning to present today?

3 MS. GARSON: No.

4 CHAIRPERSON SCHEUER: To ensure we have  
5 clarity on what we are deciding on, we will take up  
6 Petitioner's Motion as follows:

7 First, we're going to take up the Motion to  
8 Rescind the OSC.

9 After that, we will take up the Motion to  
10 Continue the Hearing on the Order to Show Cause to  
11 give the Petitioner time to prepare.

12 And after that we would take up the  
13 Petitioner's Motion to allow it to have one year to  
14 submit a Motion to Amend the Decision and Order.

15 Is that clear with the parties?

16 So, Ms. Garson, you may please proceed with  
17 your presentation on the argument on the Motion to  
18 Rescind.

19 MS. GARSON: First of all, before we begin,  
20 I would like to move that the Commission accept our  
21 statement on the OSC, and the pleadings and record in  
22 this matter for consideration on the Motion to  
23 Rescind and continue.

24 CHAIRPERSON SCHEUER: Which specific  
25 documents?

1 MS. GARSON: The records and files in this  
2 matter in this docket, and our statement position in  
3 response to the OSC.

4 CHAIRPERSON SCHEUER: I'm going to ask the  
5 parties and the Commissioners if there's any  
6 objection. If you would actually be more specific  
7 than just the motion to the proceedings.

8 Let's take a short recess.

9 (Recess taken.)

10 CHAIRPERSON SCHEUER: Thank you.

11 We are back on the record.

12 Ms. Garson, please specify which documents  
13 you're attempting to include into the record.

14 MS. GARSON: Our Motion to Rescind made  
15 reference to the University of Nations' Statement of  
16 Position and rebuttal to Statement of Position of the  
17 Office of Planning on the Order to Show Cause issued  
18 by the State of Hawai'i Land Use Commission on March  
19 29, 2019.

20 So because we made reference to that  
21 document in our motion, I just wanted to be sure that  
22 we can refer to that, and exhibits, if any. And  
23 also --

24 CHAIRPERSON SCHEUER: Exhibits to that  
25 particular document?

1 MS. GARSON: All of the exhibits.

2 CHAIRPERSON SCHEUER: To what? All of the  
3 exhibits to what?

4 MS. GARSON: That we filed for the OSC.

5 CHAIRPERSON SCHEUER: It's an overly broad  
6 request.

7 MS. GARSON: I ask we be able to refer to  
8 the exhibits that were attached to the Position  
9 Statement.

10 Additionally, the record also has the  
11 Motion to Amend that was filed in 2006, and the  
12 transcript of March 1st, 2007.

13 So those are the documents that I would  
14 like to be able to have you consider also.

15 CHAIRPERSON SCHEUER: Parties, are there  
16 objections -- first of all, did the Office of  
17 Planning and the County, and the -- do you understand  
18 the request? Or do you have clarifying questions  
19 before responding whether you have objections?

20 MR. KIM: I guess just a clarifying  
21 question.

22 Is the request just to admit the exhibits  
23 and statement into the record?

24 CHAIRPERSON SCHEUER: Ms. Garson, please  
25 respond.

1 MS. GARSON: We want to admit the exhibits,  
2 if possible, to the record on this Motion to Rescind.

3 CHAIRPERSON SCHEUER: Which exhibits?

4 MS. GARSON: The exhibits that are attached  
5 to the Position Statement 18 through 28a -- b, sorry.

6 CHAIRPERSON SCHEUER: County, does that  
7 respond? You can follow up if you need further  
8 clarity.

9 MR. KIM: No. I believe that responds.

10 CHAIRPERSON SCHEUER: Do you have an  
11 objection?

12 MR. KIM: No objection.

13 CHAIRPERSON SCHEUER: Office of Planning,  
14 questions or objections?

15 MS. APUNA: No objections to the entering  
16 or admitting the exhibits to this record.

17 CHAIRPERSON SCHEUER: The exhibits to --

18 MS. APUNA: To the record.

19 CHAIRPERSON SCHEUER: Which exhibits, just  
20 to be clear so we all understand what's going on.

21 MS. APUNA: The record that she specified  
22 as attached to Position Statement.

23 CHAIRPERSON SCHEUER: Thank you.

24 Commissioners? Commissioner Wong.

25 COMMISSIONER WONG: First, which motion are



1 we dealing with right now, just to make sure I have  
2 it correct?

3 CHAIRPERSON SCHEUER: Right now we are  
4 dealing with the Motion to Rescind the Motion, their  
5 Motion to Rescind our Motion on the Order to Show  
6 Cause.

7 COMMISSIONER WONG: So it's like a  
8 prehearing motion, or so is it appropriate to -- is  
9 it appropriate to include all these exhibits for this  
10 motion? You know, it kind of doesn't make sense to  
11 me right now. So I'm --

12 CHAIRPERSON SCHEUER: Do you object to it?

13 COMMISSIONER WONG: Yes, I object to it.

14 CHAIRPERSON SCHEUER: Commissioners?  
15 Commissioner Okuda.

16 COMMISSIONER OKUDA: Chair, I believe that  
17 what's been filed in the docket is already part of  
18 the record, number one.

19 And number two, in the interest of having a  
20 full discussion and full consideration of everything  
21 based on the merits, I believe that the Commission  
22 can and should look at the entire record of the  
23 docket which includes everything that's filed,  
24 because that comprises the information that's been  
25 presented to us; and sometimes statements made in one

1 part of the docket or record, might be relevant in  
2 making a decision to another part.

3 So unless there's some real prejudice,  
4 actual prejudice that's demonstrated by the parties  
5 or prejudice to the decision-making process of the  
6 Commission, and that prejudice can include, you know,  
7 waste of time or things like that, number one, I  
8 believe that what's been filed already is part of the  
9 record;

10 And number two, any of the parties can  
11 refer to any part of the docket that's been  
12 presented; and the Commission can take into account  
13 anything in the docket in making its decision, unless  
14 I believe there's a ruling otherwise.

15 CHAIRPERSON SCHEUER: So, Mr. Okuda, you  
16 believe that the documents that -- at least the  
17 narrow request that Ms. Garson has asked for already  
18 are part of the record in this matter?

19 COMMISSIONER OKUDA: That's my belief, my  
20 own advice. I don't believe that the Petitioner's  
21 motion is really necessary at this point.

22 We can just get to the heart of the matter,  
23 because what's filed has been filed, and I'll  
24 disclose that I've tried to read, and I think I've  
25 read everything that's been filed, including the

1 stipulation that was filed very recently.

2           So, you know, it's going to be hard for me  
3 to unring the bell now and ignore something that I've  
4 already read.

5           I will ignore it if there is a proper  
6 motion that's granted to exclude on some legal or  
7 proper grounds, improper evidence or improper filing  
8 in the record.

9           But generally I plan to consider everything  
10 that's been filed in this docket.

11           CHAIRPERSON SCHEUER: Thank you, Mr. Okuda.

12           Anything further, Commissioners?

13 Commissioner Chang.

14           COMMISSIONER CHANG: Thank you.

15           I guess I share the same sentiment as  
16 Commissioner Okuda. And I guess my confusion was,  
17 with your motion, are you seeking to just enter a  
18 limited portion of the record? Because I, like  
19 Commissioner Okuda, believe that everything that has  
20 been filed in this docket is part of the record  
21 already.

22           So by just specifying certain documents,  
23 are you then precluding everything else that's  
24 already been filed? I'm not sure, just in abundance  
25 of caution you wanted to direct us to particular

1 documents, but I too believe that everything that has  
2 been filed with LUC, late including, is already part  
3 of the record.

4 CHAIRPERSON SCHEUER: Thank you,  
5 Commissioner Chang. You may respond, Ms. Garson, to  
6 Commissioner Chang's inquiry.

7 MS. GARSON: Thank you.

8 It was really an overabundance of caution,  
9 so I did not mean to confuse the Commission at all.  
10 And if that is the Commission's position, I would  
11 withdraw the motion.

12 CHAIRPERSON SCHEUER: Thank you.

13 To repeat, where we are procedurally,  
14 because it's already become, dare I say, kapulu.

15 First, we will take up the motion on the  
16 Order, to Rescind the Order to Show Cause.

17 After that we will take up the Motion to  
18 Continue the Hearing on Order to Show Cause.

19 Finally, we will take up the Petitioner's  
20 Motion to allow for one year.

21 Are you prepared to start to present on the  
22 first item, Ms. Garson?

23 MS. GARSON: I am prepared.

24 First of all, I would like to correct the  
25 record. I apologize, in some of our pleadings we

1 made references to a May 1st and 2nd date for the  
2 hearing on the Motion to Amend the 2006 motion. That  
3 was a typographical error. It was on March 1st,  
4 2007.

5 I also think in our pleadings we made  
6 reference to two days of hearing, March 1st and 2nd;  
7 it was only one. So I apologize for those errors and  
8 so I just wanted to correct the record.

9 CHAIRPERSON SCHEUER: Those are now  
10 entered.

11 MS. GARSON: Thank you.

12 This docket has a procedural anomaly. The  
13 Motion to Amend the 2003 Decision and Order was filed  
14 in 2006. There was a hearing on it on March 1st,  
15 2007, and there was no resolution to that motion.

16 Procedurally, for the Commission to then  
17 issue an OSC on failure to comply with the original  
18 conditions of the D&O was really being denying the  
19 Petitioner due process to continue on in its Motion  
20 to Amend.

21 So just from a procedural perspective, you  
22 cannot issue the OSC without dealing first in some  
23 fashion with the Motion to Amend. It is pending. It  
24 is out there.

25 If you proceed to the OSC and issue an

1 order, that motion will have never been addressed in  
2 the docket. Procedurally you need to address that  
3 before you proceed with the Order to Show Cause.

4 This is particularly important, because I  
5 think the OSC was based, at least the Office of  
6 Planning's position was that they needed to complete  
7 part of the project by 2007. So if 2007 was a date  
8 that they had to complete, this Motion to Amend was  
9 filed prior to that.

10 Again, it shouldn't have been addressed --  
11 it should be addressed before you proceed to the OSC.

12 What the Petitioner would like to do, and I  
13 would like to say, as in your confines of the Motion  
14 to Rescind, so with that argument and what is in our  
15 pleadings, that is our position on the Motion to  
16 Rescind.

17 CHAIRPERSON SCHEUER: Thank you.

18 Commissioners, are there questions for Ms.  
19 Garson? Commissioner Okuda.

20 COMMISSIONER OKUDA: Thank you, Mr. Chair.

21 Ms. Garson, can you cite to specific legal  
22 authority, meaning statute, rule, or case that holds  
23 or states that the Commission cannot proceed with an  
24 order to show cause where there's pending a motion to  
25 amend?

1 MS. GARSON: The constitutional principle  
2 of due process.

3 The Motion to Amend itself is the contested  
4 case. There is due process considerations that need  
5 to be taken into account, privileges, rights on the  
6 Motion to Amend.

7 By proceeding to the OSC without addressing  
8 those, they deny the Petitioner due process to  
9 proceed with the Motion to Amend.

10 COMMISSIONER OKUDA: My question wasn't a  
11 question of argument.

12 My question was: Can you give me a  
13 citation to a specific statute, a specific  
14 constitutional provision?

15 And when we say that, I would want article  
16 and section. When I'm asking for a statute, the  
17 specific citation to section, if it is the Hawai'i  
18 Revised Statutes, or if it is a case, the case name,  
19 reporter citation.

20 And this is the reason why. This is not a  
21 trick question. I'm just trying to find out what the  
22 authority is so that I can look at that authority to  
23 be sure that we comply with whatever authority we're  
24 supposed to comply with.

25 So, again, it's a specific legal authority

1 which states or holds that the Land Use Commission  
2 cannot proceed with an order to show cause while a  
3 motion to amend is pending.

4 CHAIRPERSON SCHEUER: The record will note  
5 that counsel is looking for a document.

6 MS. GARSON: I think the basic elements of  
7 procedural due process were discussed in Sandy Beach  
8 Defense Fund versus City Council, and the City  
9 Council and the City and County of Honolulu, 70  
10 Hawai'i 361, 1989.

11 COMMISSIONER OKUDA: Isn't it true that the  
12 Hawai'i Supreme Court -- let me just make sure that  
13 I've got it clear in my mind.

14 You cite to those cases for the proposition  
15 that somehow the party's due process rights would be  
16 violated where an order to show cause is considered  
17 by the Land Use Commission before deciding a pending  
18 motion to amend. Is that --

19 MS. GARSON: I am citing to those cases for  
20 procedural due process principles, which I think are  
21 in play if you hear the Order to Show Cause before  
22 you rule on the Motion to Amend.

23 COMMISSIONER OKUDA: Let's hold that  
24 thought here. I just wanted to make sure that we  
25 have this point clear, we have some agreement on



1 this.

2 Holding the argument or statement -- let me  
3 not call it an argument -- the statement that you  
4 just made, putting that aside or holding that  
5 thought, because we will come back to that, but isn't  
6 it true there is no statute, rule, or case, appellate  
7 case in the State of Hawai'i which holds that the  
8 Land Use Commission may not proceed with an order to  
9 show cause while a motion to amend is pending?  
10 There's no case.

11 MS. GARSON: No. And your rules don't  
12 provide for that either. Your rules do not have a  
13 time limit on motions.

14 COMMISSIONER OKUDA: I'm trying to find out  
15 whether we're prohibited by a case from proceeding  
16 with an order to show cause while a motion to amend  
17 is pending. And you do agree with me there is no  
18 appellate case that so holds, correct?

19 MS. GARSON: Specifically on that very  
20 narrow issue, I agree.

21 COMMISSIONER OKUDA: Isn't it true that the  
22 Sandy Beach case gives a definition of due process,  
23 and that definition is basically that a party has  
24 notice of what the government entity intends to do  
25 and the opportunity to be heard with respect to what

1 the government entity intends to do before the  
2 government entity actually does the stuff?

3 MS. GARSON: That's correct.

4 COMMISSIONER OKUDA: So you would have to  
5 agree in this case that your client got notice of  
6 what the Land Use Commission intended to do with  
7 respect to the matters that are involved in this  
8 Order to Show Cause, correct?

9 MS. GARSON: Again, I am speaking to the  
10 motion to amend; and no, they did not.

11 COMMISSIONER OKUDA: No, no, no. I'm  
12 talking about notice of the Order to Show Cause. I  
13 mean, that's in the record. And that's why my view  
14 is we should have the entire record before us when we  
15 make a decision.

16 Your party is not contesting a fact that  
17 your client received a copy of the Order to Show  
18 Cause which has resulted in this proceeding, correct?

19 MS. GARSON: No, they are not. But that is  
20 not my point.

21 COMMISSIONER OKUDA: Okay. I understand  
22 that, but I just want to try to narrow some of these  
23 points.

24 And because you're here and you filed  
25 pleadings and motions and things like that, you do

1 agree that you had, or your client has had at least  
2 preliminarily an opportunity to be heard, correct?

3 MS. GARSON: Not on the Motion to Amend.

4 COMMISSIONER OKUDA: But you're able to  
5 make the argument that the existence of the Motion to  
6 Amend somehow precludes the Land Use Commission with  
7 proceeding with the Order to Show Cause; correct?

8 MS. GARSON: Correct. But you have not had  
9 the conclusion of the hearing on the Motion to Amend,  
10 and there is no notice of your decision on the Motion  
11 to Amend either.

12 COMMISSIONER OKUDA: Let's talk about the  
13 Motion to Amend.

14 When was that Motion to Amend filed?

15 MS. GARSON: 2006.

16 COMMISSIONER OKUDA: Was there anything  
17 that precluded your client, or any of its consultants  
18 from -- I don't want to use the term "resurrecting",  
19 because that motion was filed -- but doing something  
20 to move that motion forward?

21 MS. GARSON: They were having -- there were  
22 a number of considerations, mostly financial, that  
23 precluded them from coming forward. However, my  
24 point is the simple existence, the simple existence  
25 of the unresolved motion precludes the OSC.

1           Just the fact that it is unresolved, and it  
2           is in your record. So that if you did hold the OSC  
3           and you order to revert it, procedurally that motion  
4           is still pending. You have to address the motion.

5           COMMISSIONER OKUDA: Okay, well -- I don't  
6           want to -- I understand your point. And I'm not  
7           ignoring your point, and I don't think any of my  
8           fellow Commissioners are ignoring that point.

9           I'm just trying to find out whether or not  
10          we have certain agreements on certain facts.

11          So there were these financial reasons you  
12          stated as far as why the Motion to Amend was not  
13          moved forward.

14          Besides financial reasons, were there any  
15          other reasons the Motion to Amend did not move  
16          forward?

17          MS. GARSON: They were financial, and also  
18          the fact that the University at that time was very  
19          involved in some other matters.

20          COMMISSIONER OKUDA: And in your pleadings  
21          and memos you filed, those other matters included  
22          litigation, correct?

23          MS. GARSON: Included litigation. Also  
24          included fraud.

25          COMMISSIONER OKUDA: So you had these

1 financial matters. You had these other matters which  
2 included litigation and fraud.

3 Were there any other reasons why this  
4 Motion to Amend, which was filed in 2006, was not  
5 moved forward?

6 MS. GARSON: Also because of the recession  
7 there were a number of developers that had gone  
8 bankrupt that also affected the University.

9 COMMISSIONER OKUDA: So you named financial  
10 matters, these other matters like fraud, litigation,  
11 recession.

12 Were there any other matters which  
13 prevented the Motion to Amend filed in 2006 from  
14 going forward?

15 MS. GARSON: No.

16 COMMISSIONER OKUDA: Is it your contention,  
17 or your client's contention that somehow the Land Use  
18 Commission or the staff of the Land Use Commission  
19 was responsible for any of these matters which  
20 prevented the Motion to Amend from going forward?

21 MS. GARSON: No, it was not staff's fault  
22 that these things weren't going forward.

23 And, Commissioner Okuda, once again, my  
24 position is regardless of fault. It's a  
25 procedural -- I'm raising a procedural issue.

1           COMMISSIONER OKUDA:   And my final  
2 question -- Chair, if you will indulge me -- deals  
3 with the authority for the Land Use Commission to  
4 issue an order to show cause.

5           You do agree that HAR 15-15-93,  
6 subparagraph (b) states that, and I quote:

7           "Whenever the Commission shall have reason  
8 to believe that there has been a failure to perform  
9 according to the conditions imposed, or the  
10 representations or commitments made by the  
11 Petitioner, the Commission shall issue and serve upon  
12 the party or parties or persons bound by the  
13 conditions, representation or commitment, an Order to  
14 Show Cause why the property should not revert to its  
15 former land use classification, or be changed to a  
16 more appropriate classification."

17          You do agree that's what the administrative  
18 rule states; correct?

19          MS. GARSON:   I couldn't find it fast  
20 enough, but I'll agree that that is what you read.

21          COMMISSIONER OKUDA:   And just so that --  
22 and I might be misunderstanding your filing, it's not  
23 like the Hawai'i Supreme Court has ever held that the  
24 Commission had exceeded its authority, and the  
25 governor made it his authority by signing off on this

1 administrative rule, isn't it true that in the DW  
2 Aina Le'a Development, LLC, versus Bridge Aina Le'a,  
3 LLC case, which is 134 Hawai'i 187, and actually it  
4 was at page 196 at Footnote 2, the Hawai'i Supreme  
5 Court actually quoted HAR 15-15-93(b), the provision  
6 that I read.

7 And in fact, the Supreme Court underlined  
8 and highlighted that provision in the Aina Le'a  
9 decision, which kind of leads me to believe the  
10 Supreme Court was telling us, the Land Use  
11 Commission, hey, you know, this is your rule, and you  
12 better follow your rule.

13 I mean, is that a reasonable interpretation  
14 of how to read that point of the Bridge Aina Le'a  
15 case?

16 MS. GARSON: May I just say that HRS  
17 205-4(g) specifically states the Commission may  
18 provide a condition.

19 HRS 205-4(g) states in part that the  
20 Commission may provide, by condition, the absence of  
21 substantial commencement of the use of land in  
22 accordance with such representations the Commission  
23 shall issue and serve upon the parties --

24 COURT REPORTER: You really need to slow  
25 down.

1 MS. GARSON: He read fast too (indicating).

2 COURT REPORTER: Yes, but I can understand  
3 him.

4 MS. GARSON: Let me try again.

5 The Commission may provide, by condition,  
6 that absent special substantial commencement of use  
7 of the land in accordance with representations, the  
8 Commission shall issue and serve upon the party bound  
9 by the condition an Order to Show Cause why the  
10 property should not revert to its former land use  
11 classification, or be changed to a more appropriate  
12 classification.

13 So this is what the statute provides. I  
14 have read the Bridge Aina Le'a many times. I do not  
15 know if this issue had come up in that case.

16 COMMISSIONER OKUDA: My question actually  
17 was limited to whether or not the Hawai'i Supreme  
18 Court had quoted and highlighted the provision of the  
19 administrative rule which sets forth when the  
20 Commission shall issue an order to show cause.

21 But let me just ask this one final  
22 question.

23 Chair, I promise this is the final  
24 question.

25 Would you agree that it's in fact your



1 client's filing here that leads, or allows the  
2 Commission to have reason to believe that there's  
3 been a failure to comply with the conditions?

4 Because, for example, your client filed  
5 this Motion to Substitute Petitioner and withdraw  
6 Land Use Commission approvals and revert land use  
7 district boundary classification to agricultural --  
8 and I know that's a mistaken word, should be  
9 "agriculture", but that document was filed  
10 February 4, 2019.

11 I mean, whether you folks want to back off  
12 on that document or not, the fact of the matter is  
13 the record in this case shows that your client itself  
14 raised the issue about whether or not the Land Use  
15 Commission now is required by its administrative  
16 rules to issue the Order to Show Cause.

17 MS. GARSON: And that -- and that motion  
18 was withdrawn, and I'm representing that was filed  
19 mistakenly based on the mistaken impression that they  
20 could do what they wanted to do with the property via  
21 a special permit on ag.

22 COMMISSIONER OKUDA: In fact, on page --

23 MS. GARSON: Commissioner Okuda, the  
24 petition was withdrawn, the motion was withdrawn.

25 COMMISSIONER OKUDA: But whether it was

1 withdrawn or not, the fact is your client put  
2 something in the record here, put something in the  
3 record here which contained factual statements which  
4 would lead the Commission to believe that  
5 representations made with respect to the original  
6 boundary amendment was not complied with, correct?

7           Whether or not it's withdrawn, statements  
8 were still made.

9           MS. GARSON: I think what you're asking me  
10 is what the impression of the Commission was with the  
11 filing --

12           COMMISSIONER OKUDA: No, I'm asking about  
13 the statement that is on the second page of the  
14 Memorandum in Support of the Motion, fourth paragraph  
15 down, where it specifically states the previous  
16 owners have not proceeded with the original plan.

17           Further, a residential development of this  
18 nature is not justified based on the current market  
19 conditions and needs. And talks about what it's  
20 evidenced by.

21           In other words, these are factual  
22 statements, or statements being made to a government  
23 agency. And I'm assuming with the belief the  
24 government agency, meaning the LUC, is going to rely  
25 on them, and these are statements of fact.

1 MS. GARSON: Two points. One, it was  
2 withdrawn, so, again, I'll object to us referring to  
3 it.

4 Number two, those statements are also  
5 supportive of the Motion to Amend that was filed in  
6 2006. I don't think the Petitioner -- the Petitioner  
7 basically stated those things in the Motion to Amend  
8 in 2006 which has not been resolved.

9 COMMISSIONER OKUDA: Thank you, Mr. Chair.  
10 No further questions.

11 CHAIRPERSON SCHEUER: Commissioners, are  
12 there other questions?

13 Commissioner Chang.

14 COMMISSIONER CHANG: Just a few. Thank  
15 you, Ms. Garson.

16 As I understand this motion that we're  
17 addressing at this point is your Motion to Rescind  
18 the Order to Show Cause because of the pending Motion  
19 to Amend?

20 MS. GARSON: Correct.

21 COMMISSIONER CHANG: That motion was made  
22 in 2006. As I understand, through questioning of  
23 Commissioner Okuda, your legal authority is that your  
24 clients' due process rights have been violated; is  
25 that correct?

1 MS. GARSON: Correct.

2 COMMISSIONER CHANG: I just want to walk  
3 through that same process, look at the procedural due  
4 process.

5 Your client was given notice on the hearing  
6 on the Motion to Amend in 2006?

7 MS. GARSON: Correct.

8 COMMISSIONER CHANG: And your client was  
9 given an opportunity to participate in the Motion to  
10 Amend?

11 MS. GARSON: Correct.

12 COMMISSIONER CHANG: So due process was  
13 satisfied, would you agree?

14 MS. GARSON: Up until that point.

15 COMMISSIONER CHANG: Up until what point?

16 MS. GARSON: Up until the hearing.

17 Again, my point is there was no conclusion  
18 to that hearing. They were supposed to come back.  
19 So the procedure is still in place. I mean the  
20 procedure is still in place for them to come back and  
21 have their Motion to Amend heard.

22 COMMISSIONER CHANG: Let me ask you. So  
23 your position is that it's an open docket, the Motion  
24 to Amend? And that has not been resolved.

25 Has your client -- how has your client been

1 prejudiced? That was in 2006. So what has your  
2 client done -- you've cited considerations like there  
3 was the University had issues, economy, but what has  
4 your client done to address that motion in a timely  
5 fashion?

6 Because now we're in the year 2019, so  
7 approximately how many years has passed, 13 years has  
8 passed.

9 So how has your client been prejudiced by  
10 that "no action" on the Motion to Amend when it has  
11 been 13 years later? And you're raising this  
12 question about the LUC's lack of addressing the  
13 Motion to Amend or closing the Motion to Amend.

14 How has your client been prejudiced given  
15 the 13 years?

16 MS. GARSON: I think the prejudice comes if  
17 you move onto the OSC, and if for some reason the OSC  
18 is granted, at that point that is where our client  
19 would be prejudiced by not being able to come forward  
20 and present its plan that was first brought forth in  
21 the Motion to Amend in 2006.

22 So the prejudice comes at the time now if  
23 the OSC goes forward, that they have not had that  
24 opportunity.

25 COMMISSIONER CHANG: But didn't you have

1 the opportunity 12 years ago, 11 years? Doesn't your  
2 client bear any responsibility to have timely brought  
3 back that Motion to Amend?

4 MS. GARSON: Again, going back to what I  
5 was saying to Commissioner Okuda. Your rules do not  
6 have a time limit on motions. A petition, if you do  
7 not act on them within 365 days, they're granted.  
8 Some court rules, some other rules say if a motion is  
9 not addressed within a certain period of time, it's  
10 denied.

11 Your rules don't have those kind of  
12 protections for a situation like that.

13 Again, all I'm saying is this is a  
14 procedural anomaly and it has to be addressed before  
15 you proceed.

16 And what I wanted to do is to take that  
17 position, and without waiving that, going to the  
18 resolution that we have brought forward with the  
19 stipulation for the continuance of the OSC and the  
20 one year.

21 COMMISSIONER CHANG: So are you considering  
22 withdrawing your Motion to Rescind?

23 MS. GARSON: No, no.

24 COMMISSIONER CHANG: So when you say your  
25 client has not had protections because there's been

1 no timely closure on the Motion to Amend, but in the  
2 absence of a particular statute or rule or time  
3 period, don't we apply the reasonableness?

4 Is 13 years, in your mind, reasonable for  
5 no action to be taken, no initiation on the part of  
6 the Petitioner to come forward and seek closure on  
7 that?

8 MS. GARSON: And they are ready now.

9 COMMISSIONER CHANG: But you're saying  
10 because the LUC failed to address the Motion to  
11 Amend, we are precluded from addressing the Order to  
12 Show Cause?

13 MS. GARSON: I'm not blaming the LUC. All  
14 I'm saying is that it hasn't been granted. It hasn't  
15 been denied. There has been no action on it.

16 And procedurally that should be done before  
17 you move on.

18 COMMISSIONER CHANG: The LUC is caught in a  
19 procedural dilemma as well. On one hand you're  
20 saying we can't proceed with the motion to the Order  
21 to Show Cause until we close this motion to amend.

22 MS. GARSON: Right, which is why our  
23 solution -- and we truly were trying to be  
24 cooperative and helpful in putting forth the  
25 stipulation that we raised.

1           That wasn't the direction that the Chair  
2           wanted to go, but with the stipulation, Office of  
3           Planning and County have also agreed to allow us one  
4           year to bring back a motion to amend before the  
5           Commission within the one year and continue the OSC.

6           Again, we are trying to come up with a  
7           solution, given this procedural issue. We felt that  
8           that was a fair process and procedure to go through.

9           COMMISSIONER CHANG: I understand, but you  
10          were sort of caught in a procedural dilemma as well,  
11          given your Motion to Rescind the Order to Show Cause  
12          because of failure to act on the Motion to Amend.

13          You understand the dilemma that you have  
14          placed the LUC in by your motion in the absence of  
15          withdrawing your motion, we're now having to address  
16          that, the merits of your motion?

17          MS. GARSON: Yes. Okay. So this is  
18          another thing that you can do procedurally, rescind  
19          the order to show cause, order that the Petitioner  
20          come back within one year with an amended motion to  
21          amend. That will also work procedurally.

22          COMMISSIONER CHANG: Or procedurally you  
23          could withdraw your Motion to Rescind.

24          That's all the questions I have.

25          CHAIRPERSON SCHEUER: Thank you,



1 Commissioner Chang.

2 Just at this point before any other  
3 Commissioners might say anything.

4 Yes, it was my choice on which order to  
5 take up your various motions, but obviously if we  
6 acted positively on your motion for the order to  
7 rescind, it would make all the other motions moot.  
8 That's why we are taking it up.

9 MS. GARSON: It wasn't a criticism.

10 CHAIRPERSON SCHEUER: Commissioners, are  
11 there further questions? Commissioner Wong.

12 COMMISSIONER WONG: So got to think this  
13 one through.

14 13 years to me is a long time for anything.  
15 Some of my kids from judo wasn't even born yet, so  
16 they don't even know who Kalapana is, or weren't even  
17 born for 9/11.

18 It just blows my mind, because if I get  
19 audited by the IRS, they can only go back six, seven  
20 years. And 13 years, if it was me, I would have done  
21 something, say, hey, LUC, let's do something, because  
22 you guys are not doing anything. Put the heat on,  
23 write a letter.

24 I'm sorry, for local boy here, it just  
25 doesn't make sense, just plain and simple, not legal

1 stuff. I mean, I mean I would have done -- if I was  
2 the owner, even if I went to bankruptcy or something,  
3 if something is outstanding, you know, my wife would  
4 have killed me if I left something outstanding like  
5 leaving the laundry out or something.

6 It's just this local boy would say, do  
7 something. Hey, at least put some records in to say  
8 I want to do something.

9 But there was nothing done from 2006 to  
10 pretty much present. And I understand about  
11 bankruptcy and all this, that, but somebody dropped  
12 the ball on your side, or maybe LUC, but someone  
13 really dropped the ball.

14 And to me this Motion to Amend is kind of  
15 to me in my own mind is dead because it's too long.

16 So I can't fathom right now, unless you can  
17 explain in a local, no nonsense, non-legal why we  
18 should even bring this up any more.

19 MS. GARSON: I'm sorry, I actually can't  
20 think local when I'm -- I'm going back to the rule.  
21 That there isn't -- that you don't have a rule about  
22 when motions need to be finished, and so it's still  
23 there. And again, without blame, the motion is  
24 pending.

25 COMMISSIONER WONG: But there is no rule to

1 say either way, is that correct?

2 MS. GARSON: That it's denied or granted?

3 COMMISSIONER WONG: Correct.

4 MS. GARSON: Correct, it's neither denied  
5 or granted, which is why I'm saying it's a procedural  
6 anomaly that it is here.

7 COMMISSIONER WONG: If you think about it,  
8 when I get audited by the IRS, heaven forbid, now,  
9 after six, seven years, they're not even going to  
10 look, so I burn all my stuff. To me, if IRS come,  
11 sorry, you know, I burned it.

12 So I can't figure it out. I'm sorry, it's  
13 just bothering the heck out of me, just no-nonsense  
14 style thinking.

15 MS. GARSON: Thank you, Commissioners.

16 CHAIRPERSON SCHEUER: Commissioners, are  
17 there other questions for the Petitioner?

18 Commissioner Aczon.

19 COMMISSIONER ACZON: Just a quick one. I'm  
20 trying to recollect the last meeting, and I'm just  
21 kind of wondering, you know that there was an  
22 outstanding Motion to Amend, and why did you file a  
23 Motion to Revert? I know it was withdrawn, but I'm  
24 just kind of wondering, you knew that there was a  
25 pending amendment, but you filed a Motion to Revert

1 the property. Just kind of wondering what is the  
2 source?

3 MS. GARSON: As I said, that was an error,  
4 which is why it was withdrawn.

5 CHAIRPERSON SCHEUER: Commissioner Chang,  
6 we're going to take a break in a few minutes.  
7 Hopefully you can squeeze in a question or two as  
8 well.

9 COMMISSIONER CHANG: Would it have been --  
10 even though your Motion to Revert was withdrawn,  
11 would it have been a reasonable conclusion on the  
12 part of LUC that you had waived any concerns  
13 regarding the Motion to Amend, given the fact that  
14 you initiated the Motion to Amend, again,  
15 notwithstanding that it's been reverted, but  
16 procedurally wouldn't that have been a reasonable  
17 conclusion by any of the parties, including the LUC,  
18 that you yourself had determined that the Motion to  
19 Amend was no longer viable, therefore, you were  
20 looking at reverting the property?

21 Notwithstanding the fact that it has been  
22 withdrawn, wouldn't you agree that that would have  
23 been a reasonable conclusion by the parties that the  
24 Motion to Amend was no longer viable because the  
25 Petitioner themselves had determined that they were

1 going to do a different project, they could do the  
2 different project if the property was reverted to the  
3 original classification? Isn't that a reasonable  
4 conclusion?

5 MS. GARSON: Again, I am a little bit  
6 uncomfortable, and I'll object to speaking about a  
7 motion that was withdrawn, so it does not have any  
8 further effect.

9 With the motion, like I said, mistaken  
10 belief that they could do what they wanted similar to  
11 what was proposed in the 2006 amendment, so in my  
12 mind, knowing those facts, no, they aren't exclusive.  
13 They thought they could do the project in ag with a  
14 special permit, what they wanted, so it wasn't  
15 abandonment of that, they were still proceeding.

16 COMMISSIONER CHANG: But they made a  
17 conscious choice that what they were proposing to do  
18 under the original 2006 Motion to Amend, they could  
19 now do if they reverted the property. So the  
20 Petitioners themselves concluded that the Motion to  
21 Amend was no longer necessary because what they were  
22 proposing to do could have been done under a  
23 reversion to the ag property.

24 MS. GARSON: And the motion was withdrawn.

25 CHAIRPERSON SCHEUER: Commissioners? If I

1 may.

2 I have a few questions. They're not in as  
3 good an order as I would like, so bear with me.

4 Going to one of the most recent things that  
5 you said, you stated your clients were under the  
6 impression that they could do what they wanted with a  
7 reversion, and now they have decided that they cannot  
8 do what they wanted with the reversion.

9 Have I understood you correctly?

10 MS. GARSON: Correct, but that is probably  
11 not whatever they wanted.

12 CHAIRPERSON SCHEUER: But I believe part of  
13 the substantive issues we have on this record right  
14 now is that we're not entirely clear what they want  
15 to do. Is that correct?

16 MS. GARSON: So again, the Motion to Amend.

17 CHAIRPERSON SCHEUER: No, no, it's a simple  
18 question.

19 Does your client know what it wants to do  
20 with the property, and have they put that into the  
21 record?

22 MS. GARSON: No. At the last hearing,  
23 right? The new development plan, the new development  
24 plan is within the exhibits in response to the OSC.

25 CHAIRPERSON SCHEUER: Could you direct me

1 specifically to which exhibit?

2 MS. GARSON: It begins on Exhibit 29, 30,  
3 31 of the exhibits that were provided in the OSC.

4 CHAIRPERSON SCHEUER: So thank you for  
5 directing me to that part of the record.

6 Can you point to me any part of your  
7 written pleadings where you've raised this procedural  
8 due process issue?

9 MS. GARSON: In our motion, page 2,  
10 Commission's issuance of the OSC --

11 COURT REPORTER: Sorry, can't hear you.

12 MS. GARSON: The Commission's issuance of  
13 the OSC without first addressing the 2006 Motion to  
14 Amend premature, inappropriate, without  
15 justification.

16 CHAIRPERSON SCHEUER: Thank you.

17 You said there was another reference to it.

18 MS. GARSON: The remainder of the due  
19 process argument is actually in the section regarding  
20 a continuance.

21 CHAIRPERSON SCHEUER: Thank you.

22 Have you been procedurally to this point  
23 been barred from filing a new motion to amend? Have  
24 you filed any motion to amend?

25 MS. GARSON: No.

1           CHAIRPERSON SCHEUER: In the -- so we spent  
2 a bunch of time discussing Motions to Revert and  
3 withdraw of the Motion to Revert.

4           Did your client, in its withdrawal of its  
5 Motion to Revert, two things, first of all.

6           That was presented to us in a letter as a  
7 request to withdraw the motion. The title of the  
8 document is Request to Withdraw Motion to Substitute  
9 Petitioner and Withdraw Land Use Commission Approval  
10 and Revert Land Use District Boundary Classification  
11 to Agricultural, Docket A02-737.

12           It was fashioned as a request to withdraw  
13 the motion. Do you believe procedurally we have to  
14 act on that request?

15           MS. GARSON: I did not think that you had  
16 to. I know that your website under that motion is it  
17 says "withdrawn".

18           CHAIRPERSON SCHEUER: That's not responsive  
19 to my question.

20           MS. GARSON: I'm sorry.

21           CHAIRPERSON SCHEUER: It's styled as a  
22 request to a motion. Presumably if it is a request,  
23 you're asking for us to go act on it.

24           MS. GARSON: I think a motion can be  
25 withdrawn without Commission's approval.



1           CHAIRPERSON SCHEUER:   So then why is it  
2           phrased as a request?

3           MS. GARSON:   To be polite.

4           CHAIRPERSON SCHEUER:   In that request for  
5           the Motion to Withdraw, did you raise the procedural  
6           due process issues?

7           MS. GARSON:   No.

8           CHAIRPERSON SCHEUER:   Did you raise the  
9           desire to file an amended motion -- a motion to  
10          amend, rather?

11          MS. GARSON:   They asked for an opportunity  
12          to update the Commission on the project.

13          CHAIRPERSON SCHEUER:   So they did not  
14          actually ask for a motion, state any intent to file a  
15          motion to amend or address the pending motion at all?

16          MS. GARSON:   Not in this letter.  I believe  
17          that it was discussed during the status hearing that  
18          you did allow them to have.

19          CHAIRPERSON SCHEUER:   The last thing at the  
20          status hearing.  That's it for now, and then we'll  
21          take a break.

22                 At the status hearing I believe one of the  
23          Petitioner's witnesses claimed that the reason why  
24          the Commission did not act upon the -- said under  
25          oath that they believe that the reason that the

1 Commission did not act on this was a loss of quorum.  
2 Is that correct?

3 MS. GARSON: That he stated that? I read  
4 that testimony, and that was a statement that was  
5 made.

6 CHAIRPERSON SCHEUER: But is the statement  
7 itself correct?

8 MS. GARSON: I personally do not know.

9 CHAIRPERSON SCHEUER: Have you reviewed the  
10 transcript?

11 MS. GARSON: I reviewed the transcript of  
12 what he said. What I haven't done is gone through  
13 all the subsequent Commission meetings to see when  
14 the next meeting was.

15 My educated guess is that perhaps there was  
16 a loss of quorum for a period of time, but I'm sorry,  
17 I really -- that's just a guess.

18 CHAIRPERSON SCHEUER: At the end of that  
19 hearing, the transcript for that hearing, does it  
20 indicate that there was somehow a loss of quorum?

21 MS. GARSON: 2007.

22 CHAIRPERSON SCHEUER: Correct, that your  
23 witness referred to?

24 MS. GARSON: No, just said they would come  
25 back.

1 CHAIRPERSON SCHEUER: Let's take a  
2 ten-minute break and we will resume at exactly 11:38.

3 (Recess taken.)

4 CHAIRPERSON SCHEUER: We're back on the  
5 record at 11:39, one minute late.

6 You may know that -- people may know that  
7 professionally I work on water rights issues. When I  
8 was young I was fond of saying that water was our  
9 most important resource. Now that I'm old and  
10 arrogant, I realize time is our most important  
11 resource, it's the only thing we will run out of.

12 I don't have anything further. We will  
13 proceed with argument by the County and the Office of  
14 Planning. Commissioners? No, I'm going to move on  
15 to the County.

16 MR. KIM: County doesn't have a position on  
17 the motion.

18 CHAIRPERSON SCHEUER: To rescind?

19 MR. KIM: To rescind.

20 CHAIRPERSON SCHEUER: That was brief.

21 MS. APUNA: Thank you, Chair. I do have  
22 some comments.

23 OP does not support Petitioner 's Motion to  
24 Rescind the OSC, but would not object to the one-year  
25 stay in the proceedings.

1           The arguments cited by the Petitioner for  
2 rescinding the OSC are not valid. First, the absence  
3 of the term "substantial commencement" in a condition  
4 of the D&O does not render the OSC ineffective. The  
5 Commission is empowered to issue an OSC at anytime  
6 whenever it shall have reason to believe that  
7 Petitioner has failed to perform according to  
8 conditions or representations made by Petitioner,  
9 pursuant to HRS 205-4(g) and HAR 15-15-93(b) without  
10 stating so in a D&O condition that includes the term  
11 "substantial commencement".

12           Secondly, Petitioner's project is subject  
13 to a definitive timeline for purposes of the OSC.  
14 Petitioner has represented in Finding of Fact No. 64  
15 in plain and unambiguous language that the Hualalai  
16 Village residential development "will be completed"  
17 during the year 2007, while the development of the  
18 Cultural Center and Educational Facility should have  
19 commenced in 2007 and 2006, respectively. Consistent  
20 with this timeline, HAR 15-15-50(c)(20) and  
21 15-15-78(a) establish a ten-year deadline for DBA  
22 projects, unless incremental districting is approved  
23 by the Commission. Therefore, deadlines do exist for  
24 Petitioner's project, both of which Petitioner has  
25 failed to meet.

1           And that's all the comments I have. Thank  
2     you.

3           CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.  
4           Commissioners, are there questions for the  
5     Office of Planning? Commissioner Okuda.

6           COMMISSIONER OKUDA: Thank you, Mr. Chair.  
7           Ms. Apuna, I understand that there is a  
8     stipulation, basically gives all parties one year.

9           Is the Office of Planning objecting if the  
10    additional time was less than a year?

11          MS. APUNA: I don't think OP would object  
12    to that. I think there's room for shortening that  
13    time if needed.

14          COMMISSIONER OKUDA: If you can tell us --  
15    and if you can't, that is okay too -- but what would  
16    be the shortest time of continuing the Order to Show  
17    Cause, which the Office of Planning would think is  
18    more reasonable than unreasonable?

19          MS. APUNA: I think because there are two  
20    different possibilities here, we're talking about the  
21    additional time in order to prepare for the OSC; and  
22    then there is also additional time in order to file  
23    the Motion to Amend.

24          I think as far as proceeding with the OSC,  
25    I can see that they could use more time to better

1 prepare their argument, and that might be a much  
2 shorter timeframe, two to three months.

3 As far as the Motion to Amend, we  
4 understand that there's different studies and other  
5 things that they need to do, maybe even some Chapter  
6 343 study so that it would be -- it could be shorter  
7 than a year. I'm not sure. I would probably defer  
8 to Petitioner to give us a ballpark of what they need  
9 to do and what timing they can go with less than a  
10 year.

11 COMMISSIONER OKUDA: The reason why I'm  
12 asking this question is, I share my lawyer colleague  
13 Commissioner Wong's concerns that when --

14 CHAIRPERSON SCHEUER: For the record, not  
15 an attorney.

16 COMMISSIONER OKUDA: -- but when things go  
17 beyond ten years, it is kind of long. But at the  
18 same time, if parties are acting in good faith, and  
19 if they have certain projects in mind which would  
20 satisfy community goals such as education, welfare,  
21 things like that, you know, those are relevant  
22 factors to take into account.

23 Do you think it would be  
24 reasonable/unreasonable where, you know, a further  
25 hearing on the Order to Show Cause be scheduled maybe

1 three, four or five months, but to take into account  
2 that if, for example, the Petitioner, you know, is  
3 showing diligence in moving forward with a concrete  
4 plan, that maybe that short fuse hearing can be moved  
5 or continued; but on the other hand, if there isn't  
6 actual evidence of diligence and moving forward,  
7 then, you know, the Order to Show Cause matters can  
8 be heard and a decision rendered?

9 MS. APUNA: Yes, I think that's a good  
10 position for the Commission as far as having that  
11 flexibility based on the circumstances that arise  
12 over time. So I would agree with that.

13 COMMISSIONER OKUDA: Thank you very much.

14 CHAIRPERSON SCHEUER: Are there further  
15 questions for the Office of Planning?

16 Commissioner Chang.

17 COMMISSIONER CHANG: Mr. Chair, this is the  
18 Motion to Rescind the Order to Show Cause, because of  
19 the Motion to Amend, but are you -- are we asking  
20 questions related to the Order to Show Cause and the  
21 stipulation?

22 CHAIRPERSON SCHEUER: Because of the  
23 interrelated nature of the motions, you can ask a  
24 broader question, but the portion of the procedure we  
25 are in right now is considering the Petitioner's

1 Motion to Rescind the Commission's Motion for the  
2 Order to Show Cause.

3 COMMISSIONER CHANG: Following in the line  
4 of questioning from Commissioner Okuda two questions  
5 to OP.

6 Would you agree that we have 365 days upon  
7 which a decision needs to be made on the OSC?

8 MS. APUNA: Not necessarily. You want me  
9 to expand?

10 COMMISSIONER CHANG: Please, go ahead.

11 MS. APUNA: I believe under Aina Le'a 365  
12 is with regards to if there is a finding that there  
13 is no substantial commencement -- I'm sorry, that  
14 there is substantial commencement that, therefore,  
15 the reclassification or reversion basically becomes  
16 the district boundary amendment. The Commission  
17 needs to reclassify, so they're referring to the 365  
18 days with regards to like a DBA, a new DBA because  
19 you're reclassifying because there has been  
20 substantial commencement.

21 COMMISSIONER CHANG: But if there has been  
22 a finding of no substantial commencement, use of the  
23 land, that we would be bound by 365 days?

24 MS. APUNA: I'm not sure it's clear. I  
25 wouldn't say that's necessarily correct. If you are



1 going to revert based on no substantial commencement,  
2 it would be automatic, it would be a void of the D&O.  
3 That would be -- and I don't believe that the court  
4 spoke to 365 days with regard specifically to when  
5 there's no substantial commencement and it's just a  
6 voiding of the D&O.

7 COMMISSIONER CHANG: I guess I'm looking at  
8 the Bridge Aina Le'a case, and I'm looking at -- I  
9 guess it would be page 7-11, it says:

10 Finally, the LUC must revolve the reversion  
11 or reclassification issue within 365 days, HRS  
12 205-4(g).

13 MS. APUNA: I think there's a couple  
14 paragraphs above that they're referring specifically  
15 to where there hasn't -- has been a substantial  
16 commencement. I think it's specific to substantial  
17 commencement, therefore, doing a district boundary  
18 amendment as opposed to voiding the D&O, and just  
19 simple and immediate reversion to the original  
20 classification, I think.

21 COMMISSIONER CHANG: I'm reading it. I  
22 don't want to belabor that question, but if -- since  
23 there is some uncertainty, would you again have no  
24 issue with shortening that time period to ensure it  
25 is within 365 days?

1 MS. APUNA: That would be fine. OSC was  
2 issued I think back in November of 2018, stay within  
3 the -- I'm not sure exact date, it would issues stays  
4 within 365 days of the OSC, OP would not object to  
5 that.

6 COMMISSIONER CHANG: The other question  
7 that I have is with respect to, what under the  
8 stipulation is subject to prohibition of certain  
9 types of activities. Sounds like primarily limited  
10 to ground disturbing activities.

11 I guess I'm trying to avoid the Bridge Aina  
12 Le'a situation, where the Commission did give them an  
13 opportunity to go, continue on, and that became now  
14 the basis upon which the facts ended up turning  
15 around to say there was substantial commencement.

16 So in your mind, is putting up fences,  
17 doing surveys, improving fire breaks, drilling for  
18 water sources, do you think that is related to ground  
19 disturbance activities?

20 MS. APUNA: Not for the purposes of  
21 developing the project as represented in the current  
22 D&O. I think that the reason for like fire breaks,  
23 those are safety reasons, and that's not with regard  
24 to the purpose of the project.

25 I think these things also would not disrupt

1 the use of the land should it revert back to  
2 agriculture. But basically I think Office of  
3 Planning's position is when it comes to substantial  
4 commencement, it would have to be the moving of the  
5 land, touching of the land such that it's toward the  
6 development of the project, and we don't believe  
7 these things listed here fall under that umbrella.

8 COMMISSIONER CHANG: Thank you.

9 CHAIRPERSON SCHEUER: Commissioners,  
10 anything further for the Office of Planning?

11 If not, Petitioner, you have the chance to  
12 rebut.

13 MS. GARSON: I have no rebuttal.

14 CHAIRPERSON SCHEUER: Commissioners, are  
15 there any further questions for any of the parties,  
16 particularly the Petitioner?

17 If I may say something at this point in the  
18 proceedings.

19 Having been through a few order to show  
20 causes, some of which resulted in reversion, some of  
21 which resulted in continuance, I harken back to my  
22 colleague, Malia Akutagawa. She has a beautiful  
23 summarization of what the Ka Pa'akai analysis is.  
24 There's a legal description on it, but then there's  
25 like what you're doing is like: "What get?" "What

1 going happen?" "What you going do?"

2 Similarly in these proceedings it's: "You  
3 did what you said you was going do?" "You did  
4 anything?" "Oh, if not, how come?" Right?

5 When, as the Petitioner you come in with  
6 these procedural arguments about due process, we  
7 obviously have to slow down. Take it very seriously.  
8 Those are very, very serious accusations.

9 But we are getting away from the real  
10 simple, water, important questions on this docket,  
11 which is: "Did you do what you said you was going  
12 do?" "Did you even start?" "If you didn't start,  
13 what, you got good reason?"

14 And I think you're trying to get to is, you  
15 know what, we got good reason. Stuff happened. We  
16 want to do some other things.

17 If you want to -- I'm going to say this the  
18 last time -- if you have the opportunity at any point  
19 to withdraw this motion to rescind, and we can  
20 actually get on with the substance of: "You did  
21 anything?" Right? "You know, what you did? Did you  
22 do anything?"

23 Or if you got good reason, we could get to  
24 that and some of your other motions, or we can take a  
25 ruling right now on the Motion to Rescind. Up to

1       you.

2                   I think this Commission, speaking for  
3       myself, not having consulted with them, but the tenor  
4       of the questioning, we want to get on to the  
5       substance of things, not the procedural things,  
6       because we will be here two days if we go in that  
7       direction.

8                   MS. GARSON:   Would you mind if we take a  
9       couple minutes?

10                   (Recess taken.)

11                   CHAIRPERSON SCHEUER:   We are back on the  
12       record.

13                   MS. GARSON:   I was just going to ask for  
14       perhaps a ten-minute recess if that would be okay.

15                   CHAIRPERSON SCHEUER:   We may.   In that  
16       case, I would like to take a longer recess for lunch  
17       to allow the Commissioners to eat.

18                   MS. GARSON:   That would be fine.

19                   CHAIRPERSON SCHEUER:   It's 11:55.   Is it  
20       reasonable for all the parties that we reconvene at  
21       12:45?   We will reconvene at 12:45.   Thank you very  
22       much.

23                   (Noon recess taken.)

24                   CHAIRPERSON SCHEUER:   We're back on the  
25       record.

1                   Petitioner, Ms. Garson.

2                   MS. GARSON: Thank you for allowing us that  
3 time.

4                   CHAIRPERSON SCHEUER: Absolutely.

5                   MS. GARSON: In the interest of trying to  
6 work something out and allow the Petitioner time to  
7 amend, Motion to Amend and continue the OSC, we will  
8 withdraw the Motion to Rescind.

9                   CHAIRPERSON SCHEUER: Thank you very, very  
10 much.

11                   So, Commissioners, the Motion to Rescind  
12 the Commission's Motion on the Order to Show Cause  
13 has been withdrawn. Because of that, we will now  
14 take up the next portion of the motions from the  
15 Petitioner which is -- allow me one second to get --  
16 the Motion to Continue the hearing on the Order to  
17 Show Cause to give the Petitioner more time to  
18 prepare.

19                   We are going to go through this, and as I  
20 said before the County was back in the room, we're  
21 hoping to try to wrap up by 2:30, 2:45-ish if  
22 possible. I say to all the parties, to the degree we  
23 can keep allowing everybody the chance to speak and  
24 present everything they need to keep our proceeding  
25 as efficient as possible.

1           We will go through the same procedure:  
2     Petitioner, County, OP on the Motion to Extend.

3           Are you ready, Ms. Garson?

4           MS. GARSON: Yes, I am.

5           Just for more time to proceed with the  
6     Order to Show Cause -- I'm sorry, did I  
7     misunderstand? I thought the next item was simply  
8     just whether or not to continue the time for the OSC,  
9     or are we discussing the continuance of the OSC to  
10    allow the Petitioner time to file an Intermittent  
11    Motion to Amend?

12          CHAIRPERSON SCHEUER: So --

13          MS. GARSON: I think we can combine them.

14          CHAIRPERSON SCHEUER: Excellent. You  
15    anticipated what I was going to say.

16                So it was clear to me in designing the  
17    order for today's hearing and working with staff that  
18    we had to dispense with or somehow deal with the  
19    Order to Rescind first. But after that, I'm actually  
20    flexible as long as my fellow Commissioners are okay  
21    with it. We can take it up in a combined matter, or  
22    reverse the order.

23                So what is your suggestion, Petitioner?

24                MS. GARSON: Because we have the  
25    stipulation from the County and OP, I think this can

1 be quickly addressed and hopefully resolved.

2 CHAIRPERSON SCHEUER: Just to clarify for  
3 the record, you have two remaining motions before us,  
4 correct?

5 MS. GARSON: Correct, to continue the OSC  
6 and so we can have time to prepare for the OSC which  
7 is next on the agenda, or for the LUC to continue the  
8 OSC for one year so then we can file Amended Motion  
9 to Amend.

10 CHAIRPERSON SCHEUER: Let me ask the other  
11 parties. If we were to take the second motion first,  
12 so to continue the OSC in order to provide some  
13 period of time for the Petitioner to Amend their  
14 Motion to Amend, are you procedurally okay with that?

15 Do you have any objections procedurally  
16 that we would perhaps, if we granted that motion, we  
17 would not be taking up the final motion to extend the  
18 date for the Order to Show Cause hearing to allow  
19 them to prepare for an order to show cause hearing,  
20 because obviously their focus would be on the Amended  
21 Motion to Amend, if that was clear as possible.

22 MR. KIM: It was Chair, thank you. No  
23 objection from the County.

24 CHAIRPERSON SCHEUER: OP?

25 MS. APUNA: So we're taking --



1           CHAIRPERSON SCHEUER: It's a question. The  
2 option is to take up -- I had said we were going to  
3 first take up the motion on the order to extend the  
4 time to respond for the Order to Show Cause  
5 hearing -- not exact language -- and then take up  
6 extending the time to allow them to -- motion to  
7 amend.

8           I'm suggesting we can actually do the  
9 second one first, as long as none of the parties or  
10 my fellow Commissioners have a big problem with it.

11          MS. APUNA: I know it's a question, but the  
12 agenda had --

13          CHAIRPERSON SCHEUER: The agenda was done  
14 in the order that I first --

15          MS. APUNA: So we covered the Motion to  
16 Rescind, Roman numeral V on the agenda was the action  
17 on the Motion to Rescind, which we had dealt with.

18          Roman numeral VI is the hearing and action  
19 on the evidence.

20          CHAIRPERSON SCHEUER: We're actually still  
21 on V because we split V because there were separate  
22 motions within the Petitioner's motion. And they  
23 withdrew only a portion of the motion which was the  
24 Motion to Rescind. There is still before us either  
25 to continue the hearing --

1 MS. APUNA: Okay, no objection.

2 CHAIRPERSON SCHEUER: Commissioners, are we  
3 clear?

4 COMMISSIONER ACZON: No objection.

5 CHAIRPERSON SCHEUER: Your suggestion is  
6 fine, Ms. Garson. Let's proceed with that as long as  
7 we're all clear where we are.

8 MS. GARSON: So our request is to continue  
9 the OSC for one year to allow the Petitioner to come  
10 back and file Amended Motion to Amend.

11 We've discussed this option with both OP  
12 and the County and have come up with a set of terms  
13 actually to allow us to do that. And I know you have  
14 the stipulation in front of you, but just to address  
15 some of the discussion before.

16 I believe that there is a number two in the  
17 stipulation that the Petitioner shall submit a  
18 written six-month status report to the Commission and  
19 Parties no later than November 30th, 2019. This is a  
20 stipulation. Obviously we agree to that.

21 I think that with that condition in there  
22 we will come back to you and tell you where we are in  
23 the process of amending the motion, and in that way  
24 the Commission can monitor the progress.

25 Again, we took some time in negotiating

1 with the County and OP about the stipulation. And I  
2 think it's reasonable.

3 Especially considering the County said that  
4 the property really is in the Urban District, it is  
5 Urban in the General Plan and Kona Community  
6 Development Plan.

7 I think the Commission should take into  
8 account that when considering our stipulation, and I  
9 reserve the right to call witnesses to tell you.

10 Thank you.

11 CHAIRPERSON SCHEUER: Thank you.

12 Commissioners, are there questions for the  
13 Petitioner? Commissioner Wong.

14 COMMISSIONER WONG: So getting this  
15 straight. It's to give you more time to do  
16 amending -- is that correct?

17 MS. GARSON: Correct.

18 COMMISSIONER WONG: So I think one of the  
19 Commissioners here asked the question before lunch,  
20 if we can do it, give you instead of a year, let's  
21 say six months to three months.

22 Could you do that within one of those  
23 shorter timeframes?

24 MS. GARSON: I think the problem with  
25 shorter timeframes, is the concern about the studies

1 that need to be updated. So we are asking for that  
2 time, but we will come back in six months and give  
3 you a status report at that time.

4 COMMISSIONER WONG: The reason I guess is  
5 my recollection is there's something about a 365 days  
6 for the Order to Show Cause that was brought up by  
7 someone here, sorry, wasn't listening that well. But  
8 anyway, it was more of a statement that there was 365  
9 days, within that time we have to do something with  
10 the OSC.

11 So if the timeframe was in November, we  
12 have to do something within the November timeframe  
13 from the last November to -- that's what I believe  
14 what I heard. Something has to be done. And it's  
15 now May, so it's kind of cutting it tight. Is that  
16 correct?

17 MS. GARSON: I believe that the OSC was  
18 issued March 29th of this year, so I think it's a  
19 year from the issuance is what the Commission is  
20 concerned with.

21 CHAIRPERSON SCHEUER: If I may. The  
22 Commission has, in another docket, there's been no  
23 ruling and no decision, but has been presented in  
24 arguments in different Order to Show Cause hearings  
25 we are bound to make a decision within 365 days, that

1 is the concern. If that position is correct, that we  
2 would be procedurally running up into a problem per  
3 the court's direction in Bridge the way some people  
4 read that direction.

5 Does that help clarify what the concern is?

6 MS. GARSON: I understand the concern.  
7 Perhaps I misread it, but when I was reading 205 I  
8 thought if you stipulated that there could be an  
9 additional 90 days, I'm sorry, that is a question. I  
10 can look it up right now.

11 CHAIRPERSON SCHEUER: Without answering the  
12 question, I think I can respond to say that there's  
13 been this expressed concern, and there's not crystal  
14 legal clarity about when we are obligated to make a  
15 decision by. So what we don't want to do is extend  
16 the time so long that we can no longer legally make a  
17 decision.

18 MS. GARSON: I'll talk to my client about  
19 this, but could it be then the last meeting before  
20 the 365 days run?

21 CHAIRPERSON SCHEUER: Commissioner Chang.

22 COMMISSIONER CHANG: I guess it was more a  
23 -- what is it exactly, because the way I heard the  
24 previous statement from the client is that you  
25 actually have a plan and you presented that.

1           So my question is, why would you need a  
2 year to come back and give us an update? Couldn't  
3 you within three months? You've already got a plan,  
4 that's what I heard, you have a plan of how you're  
5 going to develop the property, that you conferred  
6 with your consultant as to what kind of studies need  
7 to be done, if any new studies, give you an  
8 opportunity to work with the County, and then within  
9 that period of time, give us a status update, or at  
10 least update the staff, but I'm having a hard time  
11 understanding why you would need a year, given the  
12 fact that representation has been made that you do  
13 have a proposed development.

14           So I'm not clear why you would need so much  
15 time to determine the studies when a lot of work may  
16 have already been done.

17           MS. GARSON: The year included an update of  
18 studies. So, for example, there was a TIAR that was  
19 submitted within the 2006 application. Because it  
20 was 2006, there have been road improvements since  
21 then, so we're anticipating the need to update that  
22 TIAR.

23           That's why we're also thinking that we  
24 probably need a cultural impact assessment, those are  
25 things, because of the time that the consultants take

1 to do that, we really wanted to have the year to come  
2 back to present a full amended Motion to Amend.

3 Now, if you're asking for a status report  
4 which is a plan, like a plan for how we're going to  
5 come back to do the Motion to Amend, that could be --

6 COMMISSIONER CHANG: You're presuming that  
7 we are not going to take action on the Order to Show  
8 Cause. So I guess for me I would feel much more  
9 comfortable if you came back sooner, within three  
10 months, detailing the studies that need to be done.

11 Detailing and providing us a specific plan,  
12 and how you're proposed -- what you're proposing, as  
13 well as coordination with the County as to what kind  
14 of additional permits, if any, need to be given.

15 But I think that, just to avoid -- because  
16 there is some legal uncertainty as to the time  
17 period, and we just don't want -- I think you would  
18 appreciate that the Commission does not want to have  
19 a Bridge Aina Le'a too, that we give you some  
20 additional time, and then that time is used to  
21 bootstrap, and say, okay, now we have substantial  
22 compliance, so I think you appreciate where we are  
23 coming from.

24 MS. GARSON: So you're more talking to --  
25 yeah, okay, I understand.

1 COMMISSIONER CHANG: Thank you.

2 CHAIRPERSON SCHEUER: Commissioner Okuda.

3 COMMISSIONER OKUDA: Thank you, Mr. Chair.

4 My fellow Commissioners are a lot more  
5 polite than me. The concern arises, and I could be  
6 mistaken about what prior transcripts show, but it  
7 might have been a member of your law firm in another  
8 case that threw this argument at us, and there's  
9 nothing wrong with lawyers making arguments and  
10 advocating for their clients, because that's the  
11 obligation under the rules of professional  
12 responsibility to advocate for clients. But you can  
13 also see that where a strong position is taken about  
14 something because, you know, at least for me, I have  
15 a lot of respect for the lawyers at your firm, and  
16 the quality of work. You know, when an argument is  
17 made that there might be a certain time deadline with  
18 respect to decision-making in order to show cause  
19 cases, we got to take that concern seriously in other  
20 cases that we do. So that's the concern we have.

21 But in any event, in any event, would you  
22 or your clients have a problem if your client  
23 expressly agreed that during the time that no action  
24 is taken by the Commission on the Order to Show  
25 Cause, that your client will not argue that it took



1 any action during that time which constituted  
2 substantial commencement of the use of the land, as  
3 that term or phrase is defined in the Bridge Aina  
4 Le'a case?

5 MS. GARSON: I'll have to ask them.

6 COMMISSIONER OKUDA: You can see our  
7 concern. If we extend certain leeway on the time  
8 deadline, it would make us look very irresponsible to  
9 the appellate court that we didn't enforce conditions  
10 that they told us to enforce, and then something else  
11 like that happens. Okay, I understand that I can't  
12 get an answer on that.

13 Would you or your client agree not to do  
14 anything during the period of time where no action is  
15 taken on the Order to Show Cause, that your client  
16 will not do anything which would be considered or may  
17 be considered substantial commencement of use of the  
18 land as that term is defined under the Bridge Aina  
19 Le'a case?

20 In other words, my first question dealt  
21 with what argument you might make in this proceeding,  
22 my second question deals with the actual conduct with  
23 respect to the land. And just so that you know where  
24 I'm going, I don't play hide the ball here. I don't  
25 believe the issues in an order to show cause hearing

1 are that complex, just a question, what are the  
2 conditions, and have these conditions been met.

3 And so, you know, my own personal opinion,  
4 not speaking for anybody else on the Commission, is I  
5 don't believe a lot of time is really necessary to  
6 prepare for an Order to Show Cause hearing. And  
7 unfortunately, the Supreme Court in Bridge Aina Le'a  
8 case said, hey, LUC, your only remedy you have to  
9 deal with failure to comply with conditions is revert  
10 the property, void the boundary change.

11 If you give time, try to do stuff local  
12 style or whatever with Petitioners -- you're going to  
13 end up not being able to enforce these conditions.

14 CHAIRPERSON SCHEUER: If I may ask for  
15 clarification for your question to the Petitioner.

16 In the stipulation that the three parties  
17 have signed to, the first condition has to do with  
18 not conduct any development activities with a certain  
19 few exceptions relating --

20 COMMISSIONER OKUDA: Yeah, I understand  
21 that. But the question is whether or not they would  
22 agree that the activities would not be anything that  
23 would be considered substantial commencement of use  
24 of the land, just because sometimes the list is not  
25 really exhaustive.

1 MS. GARSON: I understand. And again, I  
2 would have to speak to them, because I need to  
3 explain to them what that means. The stipulation in  
4 three did reserve that right, but I understand that  
5 you do not want another Bridge Aina Le'a case and I  
6 can explain that to them.

7 COMMISSIONER OKUDA: Thank you, Mr. Chair.

8 CHAIRPERSON SCHEUER: We are going to go  
9 through questions, more questions for you, have a  
10 chance for the County to present, OP to present any  
11 rebuttal.

12 You can choose to talk with your client,  
13 and we can take a recess prior to taking a vote on  
14 things as is appropriate.

15 Does that make sense? So this issue you're  
16 deciding -- I'm trying to be very clean in my  
17 language. You want to talk to your client about this  
18 issue, there might be other issues you want to talk  
19 to your client before you say to us, yes, we agree,  
20 let's go through more of this hearing and see whether  
21 we can --

22 MS. GARSON: Thank you very much.

23 CHAIRPERSON SCHEUER: Commissioners, we're  
24 questioning the Petitioner. Further questions?  
25 Commissioner Chang.

1           COMMISSIONER CHANG: I have a question.  
2     The stipulation you're, one, it says essentially that  
3     you're not going to do any ground-disturbing  
4     activities.

5           Is there a reason why you choose  
6     ground-disturbing activities?

7           MS. GARSON: OP put that in.

8           COMMISSIONER CHANG: I'll ask OP when we  
9     get to OP.

10          CHAIRPERSON SCHEUER: Are there other  
11     questions, Commissioners? If not, County.

12          MR. KIM: As the County did sign off on the  
13     Party's stipulation, our position would be supporting  
14     continuance to allow Petitioner to prepare amendment.

15          Now, with that said, we did sign the  
16     stipulation agreeing to a year, but we respectfully  
17     will defer to whatever time period the Commission  
18     decides on, if the Commission does decide to grant  
19     continuance.

20          CHAIRPERSON SCHEUER: Thank you. Are there  
21     any questions for the County, Commissioners? Office  
22     of Planning.

23          MS. APUNA: Thank you, Chair. OP would not  
24     object to allowing a reasonable amount of time for  
25     Petitioner to better prepare for the OSC proceeding

1 or to provide a revised motion to amend.

2 And we too would defer to the Commission's  
3 decision as far as how long that stay or delay should  
4 last.

5 CHAIRPERSON SCHEUER: Are there question  
6 for the Office of Planning? Commissioner Chang.

7 COMMISSIONER CHANG: I'll restate my  
8 question.

9 Under the stipulation, why were you -- why  
10 was the selection of "ground-disturbing activities"  
11 the limiting or the description of what they cannot  
12 do?

13 MS. APUNA: I think that it's derived in  
14 part from Bridge Aina Le'a. I think OP's position is  
15 that there should be -- I mention for substantial  
16 commencement there would be some movement of the  
17 land, some touching the land. So I think that term  
18 might have been used in that case, but something  
19 similar to that.

20 COMMISSIONER CHANG: Are you comfortable  
21 with the provisions in the stipulation relating to  
22 revising plans, establish new and improved fire  
23 breaks, preserve the archaeological sites and  
24 continue and pursue the water resources and construct  
25 security wall, that none of those activities, if the

1 Petitioner proceeded with those, would constitute  
2 substantial commencement of use of the land?

3 MS. APUNA: We're comfortable with that.  
4 Bridge Aina Le'a isn't completely instructive in this  
5 area, but we believe that many of these things are  
6 not within the project as far as what the goals of  
7 the project are necessarily, as described in the  
8 current D&O. We wish we had more guidance of what  
9 substantial commencement means, but I think that  
10 we're comfortable that if they do any of these things  
11 and not beyond that, they will not have substantially  
12 commenced use of the land.

13 COMMISSIONER CHANG: Thank you.

14 CHAIRPERSON SCHEUER: Commissioners,  
15 further questions for the Office of Planning?

16 If I may ask one question, and it's not a  
17 specific legal question related to Bridge or any  
18 other thing.

19 From a planning perspective, why does OP,  
20 if it has an opinion, believe it's important that  
21 timeframes do be placed on entitlements such as  
22 district boundary amendments? How does that help  
23 serve the state and private interests as well?

24 MS. APUNA: I think in Bridge Aina Le'a,  
25 the court they talked about when developments aren't

1 completed or moved along in a timely manner, that  
2 planning doesn't work, because we make plans or we  
3 ensure developments go in a certain order, and if one  
4 project is not working with that timeline, then it's  
5 not how it's supposed to be.

6 And so it is important to be timely, and to  
7 adhere to the conditions or the timelines that are  
8 placed by this Commission or otherwise.

9 CHAIRPERSON SCHEUER: Thank you.

10 Do you want to rebut?

11 MS. GARSON: I have nothing further.

12 CHAIRPERSON SCHEUER: Commissioners, why  
13 don't we set a little time for any further questions  
14 for the Petitioner or any of the other parties, then  
15 I'll call for a recess to give -- when the Petitioner  
16 has a clear idea of at least some of our concerns  
17 about time and any other concerns what they might --  
18 Commissioner Okuda.

19 COMMISSIONER OKUDA: Mr. Chair, I have one  
20 additional question, which perhaps the Petitioner can  
21 answer. And that question is whether or not the  
22 Petitioner would agree to waive making any arguments  
23 or assertion that the Land Use Commission must make a  
24 decision within 365 days from the date of the Order  
25 to Show Cause with respect to the Order to Show

1 Cause.

2 CHAIRPERSON SCHEUER: So you have two basic  
3 questions for the Petitioner, Commissioner Okuda?

4 COMMISSIONER OKUDA: Chair, it's actually  
5 three questions.

6 The first question is whether or not the  
7 Petitioner will agree not to do anything which may be  
8 considered substantial commencement of use of the  
9 land as that phrase or term has been used in the  
10 Bridge Aina Le'a case.

11 Number two, whether or not the Petitioner  
12 will agree not to argue or assert in a future  
13 proceeding that it had done anything which  
14 constitutes substantial commencement of use of the  
15 land, as that phrase is used in the Bridge Aina Le'a  
16 case.

17 And by the way, the time frame for both of  
18 those questions would be the time from the date of  
19 the entry of the order to show cause forward. The  
20 Petitioner would still be able to make their argument  
21 on things that took place or did not take place prior  
22 to the entry of the Order to Show Cause.

23 And then the final question is whether or  
24 not the Petitioner will agree to weigh or not make  
25 any argument that the Land Use Commission was



1 required or is required to make its decision within  
2 365 days of the date of the Order to Show Cause.

3 So three questions, Mr. Chair.

4 CHAIRPERSON SCHEUER: Petitioner, do you  
5 want to ask any clarifying questions just to make  
6 sure that when we go into recess you're clear?

7 MS. GARSON: I think I understand what the  
8 three questions are.

9 CHAIRPERSON SCHEUER: And I don't mean to  
10 suggest anything other than Commissioner Okuda is an  
11 incredibly clear speaker, but just want to make sure.

12 Commissioners, are there any other  
13 questions for the Petitioner? Commissioner Chang.

14 COMMISSIONER CHANG: What I would like to  
15 know is sort of the bottom line for the Petitioner.  
16 Is it your intent to actually file a motion to amend  
17 LUC conditions to support a modified plan?

18 MS. GARSON: Yes. It would be the amended  
19 motion to amend or a new motion to amend. I'm not  
20 sure what form it will take, but it will be a motion  
21 to amend the present D&O.

22 COMMISSIONER CHANG: Under the current set  
23 of facts, circumstances, I think there's adequate  
24 support that the Petitioner has not substantially  
25 commenced the use of the land. Those conditions --

1 but if it is your intention to come back and have a  
2 viable project, and that you need some additional  
3 time to put forth that viable project, and do all the  
4 necessary studies, and then come into us with a  
5 motion to amend, that to me is genuine, and you're  
6 not waisting -- you're not just delaying, but that is  
7 actually your intention, and you now apparently from  
8 January to now there's a change of -- whether there  
9 is a change of leadership or a vision, a clarity,  
10 that you now realize that this new or this modified  
11 proposed plan for the land that you want an  
12 opportunity to pursue that, and yet you want to be  
13 consistent with the LUC conditions so that you would  
14 have to modify those conditions to an amendment.

15 I just want to be really clear. That is  
16 eventually you're intent, and that we are not going  
17 through this kind of futile exercise?

18 MS. GARSON: That is the intent. It's the  
19 same intent that they had in 2006 was to get the  
20 development in line with what their mission is.

21 COMMISSIONER CHANG: And I guess I would  
22 just be very cautious about that, because in 2006  
23 when you came in with a motion to amend, you didn't  
24 do anything for 13 years. And I don't think the LUC  
25 will permit that same kind of time period to pass.

1           So if you say like 2006, there's going to  
2 have to be due diligence and follow through on what  
3 you're saying.

4           MS. GARSON: They understand that.

5           CHAIRPERSON SCHEUER: Commissioners, are  
6 there any other questions for Petitioner at this time  
7 before we take a recess? Commissioner Wong

8           COMMISSIONER WONG: Following up on  
9 Commissioner Chang's question, just to make sure. So  
10 you going back to your clients now. We take a recess  
11 to ask them if we can do less time to have another  
12 hearing for motion to amend. Is that correct?

13          MS. GARSON: I think Mr. Okuda's question  
14 was whether or not we would waive the objection on  
15 the 365, if we go beyond 365 days.

16          COMMISSIONER WONG: This is another  
17 thinking style. If you have to amend the plan and  
18 you have to do all this other things,  
19 construction-wise, if you to have to do a 343 -- EIS  
20 thing, that usually takes six months to eight months,  
21 approximately if everything was going good.

22               So that's going past the 365 days  
23 approximately. So just to give a plan to amend, and  
24 not -- and set up all your ducks, wouldn't that be  
25 kind of fast with that plan, you know, going through

1 setting up the plan?

2 MS. GARSON: They have started working on  
3 the plan. We will certainly come back to you. We  
4 will come back to you if there are roadblocks in our  
5 way, and tell you.

6 COMMISSIONER WONG: Thank you.

7 CHAIRPERSON SCHEUER: Commissioner Aczon  
8 followed by Commissioner Okuda.

9 COMMISSIONER ACZON: Another clarification.  
10 You mentioned that once your client decided what they  
11 want to do, you coming back to us with a new motion  
12 to amend?

13 MS. GARSON: Actually we were thinking we  
14 were going to amend the motion to amend, but I am not  
15 leaving -- so that is what we said. I'm also not --  
16 it may be either to withdraw and refile, so I'm not  
17 sure at this point which procedural way we will do  
18 it.

19 COMMISSIONER ACZON: That's where I'm  
20 coming from. Are you going to withdraw your Motion  
21 to Amend 2006 and file another new motion?

22 MS. GARSON: I'm not sure how that is going  
23 to work. The way we worded it was Amend the Motion  
24 to Amend, we need to finish it. Somehow it will --  
25 we will either amend that or we will have a solution.

1           COMMISSIONER ACZON:   So just one motion to  
2 amend, not two?

3           MS. GARSON:   Not two.

4           CHAIRPERSON SCHEUER:   Commissioner Okuda.

5           COMMISSIONER OKUDA:   Thank you, Mr. Chair.

6           Let me just, with full disclosure, tell you  
7 how the answer responses to my questions would  
8 affect, at least my view, of the pending matter.

9           If we're forced to face these strict  
10 requirements, or potentially strict requirements of  
11 time, or the strict rules that Bridge Aina Le'a lays  
12 out, substantial commencement of use of the land,  
13 then we have to be really strict as far as how we  
14 handle time requirements, and how strictly we have to  
15 view things, even if it might create practical  
16 problems for what you folks are trying do.

17           On the other hand, if we don't have these  
18 pressures, because it's within your right to waive  
19 certain things that you're entitled to, or certain  
20 arguments you're entitled to, then it's less  
21 pressure, at least for me, to basically put pressure  
22 on you.

23           I mean, I don't have a hidden agenda here  
24 for those questions, that's why I'm asking the  
25 question.   Because the response will determine, at

1 least in my view, what alternative we have to take.  
2 Thank you.

3 CHAIRPERSON SCHEUER: Commissioners,  
4 anything further before we recess?

5 It's more of a statement than a question.  
6 The image I have in my mind is that this has gone on  
7 far too long. We're not going to try to assign blame  
8 or fault, but LUC and Petitioner, County and OP can't  
9 be hand in hand, but we can be shoulder to shoulder,  
10 we can try and hold each other accountable in our  
11 relationship to this place and your goals and what we  
12 know the goals are for the overall Urban District and  
13 economic growth of this community.

14 That's the kind of solution I'm looking for  
15 where we can stand comfortable shoulder to shoulder.

16 How long do you need, Ms. Garson?

17 MS. GARSON: 15 minutes.

18 CHAIRPERSON SCHEUER: It's 1:27. We will  
19 reconvene at 1:43.

20 (Recess taken.)

21 CHAIRPERSON SCHEUER: We're back on the  
22 record.

23 Petitioner.

24 MS. GARSON: Thank you for that time.

25 Commissioner Okuda, could you read your

1 first question again? I don't want to butcher it,  
2 that's why.

3 COMMISSIONER OKUDA: The first point is  
4 whether or not the Petitioner will agree that during  
5 the time from the Order to Show Cause date, or let me  
6 -- strike that and start all over again.

7 Whether or not the Petitioner would  
8 stipulate or agree that from the date of the Order to  
9 Show Cause going forward, that the Petitioner will  
10 not argue or claim that it had substantially  
11 commenced the use of the land as that term or phrase  
12 is used in the Bridge Aina Le'a case.

13 MS. GARSON: Yes.

14 COMMISSIONER OKUDA: The second, whether or  
15 not the Petitioner will stipulate or agree that it  
16 will not argue that it had substantially commenced  
17 the use of the land from the date of the Order to  
18 Show Cause going forward?

19 MS. GARSON: I'm sorry, I heard "argue"  
20 twice.

21 COMMISSIONER OKUDA: I might have misstated  
22 it. One question is whether or not the Petitioner  
23 will argue that it had substantially commenced the  
24 use of the land from the date of the order to show  
25 cause; and the second question or stipulation would

1 be whether or not the Petitioner will stipulate that  
2 it would not do anything which would constitute  
3 substantial commencement of the use of the land as  
4 that term is used in the Bridge Aina Le'a case, the  
5 timeframe being from the date of the Order to Show  
6 Cause going forward.

7 MS. GARSON: On number two, Petitioner is  
8 not trying to be difficult. Their concern is that  
9 because substantial commencement hasn't been -- that  
10 it's difficult to determine what that is, that they  
11 won't argue that whatever they did was substantial  
12 commencement, number one. But two --

13 COMMISSIONER OKUDA: That's fair enough.  
14 And based on what you are saying makes plenty of  
15 sense, because -- and maybe that I'm just being  
16 redundant and unnecessary, so actually the answer to  
17 the second question about whether or not -- with  
18 respect to the second question that deals with  
19 conduct which may or may not be considered  
20 substantial commencement of use of the land, Mr.  
21 Chair, I'll just withdraw that question.

22 CHAIRPERSON SCHEUER: So there's one and  
23 three.

24 MS. GARSON: Just so the record is clear,  
25 we are stipulating that we will not argue that



1 anything that we do between the time of the issuance  
2 of the OSC and the hearing on the OSC constitutes  
3 substantial commencement.

4 CHAIRPERSON SCHEUER: Mr. Okuda.

5 COMMISSIONER OKUDA: Yes, that is  
6 satisfactory. And because we also -- I also  
7 recognize that assuming everything works out, you  
8 really wouldn't want to have substantial  
9 commencement, and even in the eyes of the Commission  
10 there might be a situation where it's more proper to  
11 have a record of substantial commencement. So with  
12 your clarification, I think your clarification makes  
13 the question a lot clearer.

14 CHAIRPERSON SCHEUER: Do you want to do  
15 your third condition and allow the Petitioner to  
16 speak?

17 COMMISSIONER CHANG: Mr. Chair.

18 CHAIRPERSON SCHEUER: Commissioner Chang.

19 COMMISSIONER CHANG: What is the date? Is  
20 it from the Order to Show Cause? Can you clarify for  
21 me?

22 MS. GARSON: It was March 29th when the  
23 Order to Show Cause was issued.

24 CHAIRPERSON SCHEUER: Commissioner Okuda.

25 COMMISSIONER OKUDA: Thank you, Mr. Chair.

1           And then the last question would be whether  
2           or not the Petitioner would stipulate that it will  
3           not argue that the Land Use Commission must enter or  
4           make a decision on the Order to Show Cause within  
5           365 days of the date of the Order to Show Cause.

6           MS. GARSON:   The Petitioner stipulates to  
7           that.

8           COMMISSIONER OKUDA:   Thank you very much.

9           CHAIRPERSON SCHEUER:   Does the Petitioner  
10          have anything else that you wish to say?

11          MS. GARSON:   No, thank you very much for  
12          your patience and understanding today.   Appreciate  
13          the opportunity to be before you and present our  
14          position.   Thank you.

15          CHAIRPERSON SCHEUER:   Commissioners, with  
16          that, if there is no final questions for any of the  
17          parties -- (inaudible).

18          MS. GARSON:   Just one thing, that the  
19          things in the stipulation are things that they need  
20          to be ordered to do.

21          CHAIRPERSON SCHEUER:   Not number three,  
22          right?   The third stipulation had to do with  
23          substantial commencement, so presumably that would be  
24          struck.

25          MS. GARSON:   In the written stipulation

1 that was filed, there are four things, five things  
2 that they are going to do under number one, and I  
3 just want to make sure that those are --

4 CHAIRPERSON SCHEUER: Would you read those?

5 MS. GARSON: Be allowed to revise, update  
6 and proceed with any and all new or existing  
7 development plans and studies necessary to support  
8 the amended motion to amend. That was A.

9 B. Establish new and/or improve existing  
10 fire breaks and any other emergency work for the  
11 health and safety of the property surrounding the  
12 Petition Area.

13 C. Conduct any and all further work to  
14 protect and preserve archaeological and historical  
15 sites within the Petition Area pursuant to plans  
16 approved by the State of Hawai'i, Department of Land  
17 and Natural Resources, State Historic Preservation  
18 Division, including without limitation, the  
19 installation of signage, establishment of one or more  
20 access easements, and the restoration of damaged or  
21 disturbed burial sites.

22 D. Continue to pursue development of water  
23 sources within the Petition Area, including but not  
24 limited to test well.

25 E. Construct a security wall and/or fence

1 around the perimeter of the Petition Area.

2 CHAIRPERSON SCHEUER: So just to be clear,  
3 you're ensuring these are requirements that the  
4 Petitioner has for any motion that we make to extend?

5 MS. GARSON: That they be allowed to do  
6 those things.

7 CHAIRPERSON SCHEUER: Any further questions  
8 for the Petitioner or the parties?

9 Commissioner Chang.

10 COMMISSIONER CHANG: And I don't mean to be  
11 redundant because I know you've answered Commissioner  
12 Okuda, but I'm going to ask the same question as I  
13 asked of Office of Planning.

14 Of those five activities that you just  
15 addressed, is it your -- are any of these activities,  
16 if they are completed, substantial commencement of  
17 use of the land?

18 MS. GARSON: Not to be argumentative, I  
19 think they could be, but that's why we have excepted  
20 them. And we have said we won't argue that they are.  
21 So we won't argue that they are.

22 COMMISSIONER CHANG: Okay, very good.

23 CHAIRPERSON SCHEUER: Anything further?

24 If not, Commissioners, where we are, we can  
25 entertain a motion now. If we pass this motion, that

1 will have the effect of obviating the need to take up  
2 No. V on the Order to Show Cause motion, in which  
3 case we would then move on to our last two remaining  
4 administrative matters on the agenda, annual review  
5 and related to our executive officer and officers.

6 So I believe we can entertain a motion. It  
7 could be any kind of motion, but presumably the  
8 motion would be to extend by one year the Order to  
9 Show Cause hearing to allow the Petitioner to file an  
10 amended amendment, either an amendment to the motion  
11 to amend conditions; or to withdraw the motion to  
12 amend conditions and file a new motion to amend  
13 conditions.

14 Second, to accept the two stipulations as  
15 reflected on the transcript from this hearing  
16 regarding not arguing substantial commencement, and  
17 not arguing about the 365-day deadline.

18 And third, to come to us within six months  
19 for a status report.

20 I believe that's what the motion would  
21 potentially contain. But I can't make the motion  
22 because I'm the Chair, but I thought I would make it  
23 a little easier for whoever wants to.

24 Commissioner Wong.

25 VICE CHAIR CABRAL: Wait, the question I

1 have, have we figured out the date that our year  
2 starts on? March 29th, thank you.

3 COMMISSIONER WONG: I'm going to make it  
4 really easy for me. The motion, I want to make the  
5 motion that you just said, what you just said.

6 CHAIRPERSON SCHEUER: This is, with great  
7 respect to my Commissioners, this is why I stated it.  
8 There is a motion by Commissioner Wong.

9 Is there a second? Commissioner Mahi has  
10 seconded the motion. We may now deliberate on the  
11 motion. Is there anything further, Commissioner  
12 Wong?

13 COMMISSIONER WONG: So I wanted to make  
14 that motion that you said so eloquently and I  
15 wouldn't able to say it, this allows all parties to  
16 work together for -- to work together and to get  
17 something done. And hopefully within six months  
18 you'll come back and say, hey, guys, look what we  
19 did, and pretty much -- and then we can go from  
20 there.

21 So that's the reason I wanted to make  
22 that -- well, to do that motion. Thank you.

23 CHAIRPERSON SCHEUER: I will recognize  
24 briefly the Office of Planning's counsel.

25 MS. APUNA: Apologize, Chair, I just wanted

1 to clarify. In the stipulation it said within six  
2 months that the Petitioner would actually provide a  
3 written status report. It does not say that they  
4 would come back to the Commission. Just wanted to  
5 make that clarification.

6 CHAIRPERSON SCHEUER: Thank you for that  
7 clarification. I was not aware of that. At least  
8 the intent of what I said was that given the long  
9 history and significance of this issue that it would  
10 be more than a written status report, that we would  
11 actually come together.

12 COMMISSIONER WONG: Chair, I totally agree  
13 on that, that we come together and talk story.

14 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.  
15 We are in deliberation on the motion before  
16 us. The motion should have also reflected the  
17 agreement with the conditions that Ms. Garson read as  
18 well.

19 Commissioner Okuda.

20 COMMISSIONER OKUDA: Chair, I would like to  
21 speak in favor of the motion. And let me preface  
22 what I'm saying where there is no substantial  
23 commencement of use of the land with respect to  
24 representations made to the Commission, I agree with  
25 the rationale in Bridge Aina Le'a that there's major

1 public policy reasons including the desensitized land  
2 speculation, and frankly, people saying one thing to  
3 the government or -- and it's not to the government,  
4 actually making representations to the community  
5 about what would take place or not take place, and  
6 then not carrying out these representations.

7           So it's important, as Bridge Aina Le'a laid  
8 out, that we have an obligation to enforce these  
9 conditions. But at the same time we try to make our  
10 decisions based on the evidence that's presented in  
11 front of us. And having heard the testimony, and  
12 even though we can take the position reasonably  
13 saying, look, you've suffered fraud or misfortune or  
14 what have you, it's really not our problem. Perform  
15 the conditions no matter what.

16           What I find persuasive is the fact that  
17 even though the Petitioner was not under any legal  
18 obligation, for example, to engage in any type of  
19 housing project, it did so.

20           And it might have done so for many other  
21 reasons, but the bottom line is the bottom line.  
22 There's at least facts which indicate that it's more  
23 than words to them.

24           Now, we have to take into account that  
25 there's been significant and substantial delay in



1 meeting these conditions, that's why I agreed with  
2 the Chair that we should get together face-to-face  
3 just to keep this thing on tract.

4 But for the reasons I've stated and all the  
5 good cause in the record, I'm inclined to vote in  
6 favor of the motion.

7 CHAIRPERSON SCHEUER: Commissioner Cabral.

8 VICE CHAIR CABRAL: I thank all my fellow  
9 Commissioners and all the great legal minds around me  
10 for tracking on this. I'm much more practical person  
11 and want to get to the bottom line and the answer in  
12 rapid order, and I appreciate the Petitioner for  
13 willingness to not drag me through 13 years of  
14 history to make a decision, because that wouldn't  
15 make me a happy voter.

16 I'm a lay person. I'm just a volunteer.  
17 And, again, I'm here to try and do what's best for  
18 our community, and I think our Commissioners are, and  
19 I am particularly in favor with trying to work with  
20 the Petitioner and get something put together on this  
21 property, like the county's decision is, if that's  
22 what their plan is, the use of the land follows with  
23 what the county wants that land to be used for.

24 We clearly have to start working on  
25 developing land to provide housing and property for

1 people to live and work in, otherwise our various  
2 problems like homelessness will only grow much more,  
3 make it more and more difficult.

4           So I'm excited that hopefully, Petitioner,  
5 you folks will get together and figure out not just  
6 how to have more legal meetings, but how we can  
7 actually find the funds and partner up with somebody  
8 to get your project not just to report, but concluded  
9 it's built out. Thank you.

10           CHAIRPERSON SCHEUER: Thank you,  
11 Commissioner Cabral. Any other -- Commissioner Chang  
12 followed by Commissioner Aczon.

13           COMMISSIONER CHANG: I too am inclined to  
14 vote in favor of this motion. I think at least for  
15 me sitting on the Land Use Commission, reversion is a  
16 very, very drastic remedy and one that I think this  
17 Commission only acts with a tremendous amount of  
18 trepidation, and really looking at what is the intent  
19 of the law and the rules on this.

20           And I think we try as much as possible to  
21 the extent that we can maintain the integrity of what  
22 we had originally approved, and I think I see some  
23 genuineness.

24           I mean this room is full of a lot of  
25 clients, and I think they have a genuine desire to do

1 the right thing. And so I appreciated the  
2 willingness to come back and take some time. I will  
3 caveat that with I think six months should be  
4 sufficient time for you to come back to the  
5 Commission, and I agree physically coming back to the  
6 Commission. I want to see the plans, because I  
7 think -- I also don't want you to presume that the  
8 Commission won't take action on the Order to Show  
9 Cause in the absence of any genuine movement towards  
10 having a plan that is well thought out, you've got  
11 some -- you've done all the things that you say  
12 you're going to do.

13           You may not be able to complete them, but I  
14 think we really want to see that there is genuine due  
15 diligence towards completing them. But I think this  
16 is a really nice balance, again, maintaining the  
17 integrity of the original approval of the LUC and  
18 permitting you to move forward.

19           So for me, I think six months coming back  
20 to the Commission is a reasonable time upon which the  
21 Commission can then evaluate how serious you are to  
22 really doing this, or are you just buying more time.  
23 So for those reasons I'm inclined to support this  
24 motion. Thank you.

25           CHAIRPERSON SCHEUER: Commissioner Aczon.

1 COMMISSIONER ACZON: I hope the Petitioner  
2 appreciates and understand the Commission's hesitancy  
3 to extend the time, and in supporting this motion,  
4 and I also hope the Petitioner recognize our sincere  
5 efforts to work with the Petitioner to make this  
6 development happen. In that regards I'll be  
7 supporting the motion.

8 CHAIRPERSON SCHEUER: Anything further,  
9 Commissioners?

10 I'd just like to thank the parties for  
11 letting cooler heads prevail.

12 Mr. Orodenger, please do a vote.

13 EXECUTIVE OFFICER: The motion is to allow  
14 the Petitioner additional time for the purposes and  
15 with the conditions as stated by the Chair.

16 Commissioner Wong?

17 COMMISSIONER WONG: Aye.

18 EXECUTIVE OFFICER: Commissioner Mahi?

19 COMMISSIONER MAHI: Aye.

20 EXECUTIVE OFFICER: Commissioner Aczon?

21 COMMISSIONER ACZON: Aye.

22 EXECUTIVE OFFICER: Commissioner Chang?

23 COMMISSIONER CHANG: Yes.

24 EXECUTIVE OFFICER: Commissioner Okuda?

25 COMMISSIONER OKUDA: Yes.

1 EXECUTIVE OFFICER: Commissioner Cabral?

2 VICE CHAIR CABRAL: Yes.

3 EXECUTIVE OFFICER: Chair Scheuer?

4 CHAIRPERSON SCHEUER: Aye.

5 EXECUTIVE OFFICER: Thank you, Mr. Chair.

6 The motion passes unanimously.

7 MS. GARSON: Thank you very much.

8 (Off the record.)

9 CHAIRPERSON SCHEUER: Commissioners we are  
10 back on the record.

11 The next agenda item is a nonaction item,  
12 discussion of fiscal year 2020 LUC officers.

13 EXECUTIVE OFFICER: Just to start the  
14 process, we can appoint a nominating committee, have  
15 discussions off record, whatever you want to do.

16 We usually, tradition has always been to  
17 bring this up about this time every year.

18 CHAIRPERSON SCHEUER: I just wanted to make  
19 sure. So typically, not at all times, it has been  
20 that sort of everybody moves up in line, so the Chair  
21 serves one year, steps off. The first vice chair  
22 become the chair, second vice chair becomes the first  
23 vice chair.

24 EXECUTIVE OFFICER: That's not true.

25 That's not true. Please correct me, Dan.

1 EXECUTIVE OFFICER: It's completely up to  
2 the Commission. There have been times when that has  
3 occurred, but the Commission is really free to do  
4 whatever it wants.

5 There have been times when people have  
6 wanted to be vice chair, second vice chair, but not  
7 want to be chair. There have been times when people  
8 jump up into the chair's position.

9 Some of the things that have impacted that  
10 are, of course, desire, and then of course when the  
11 terms are up.

12 CHAIRPERSON SCHEUER: So anyway, I wanted  
13 to at least put it on the agenda so we have a chance  
14 as a group to discuss it without the pressure of  
15 having to take action. We can agendize it again for  
16 an action item.

17 Is there a general thought or pleasure of  
18 the Commission? Do we do what we have done sometimes  
19 in the past, set up a nominating committee, or do we  
20 just have a session at the next hearing?

21 COMMISSIONER WONG: For myself, I think I  
22 like how it's done where seniority also has something  
23 in there, because, you know, you have to give the  
24 people who are about to leave, a chance to those who  
25 are senior and about to get off the Commission, give

1       them a chance to take a position.

2               So looking at that too, to allow them the  
3       opportunity before their term is out. So that's my  
4       only statement that, for example, I think seniority  
5       wise look at Aaron or Nancy to do something.

6               VICE CHAIR CABRAL: Are you calling me old?

7               COMMISSIONER WONG: More experienced  
8       individuals to have a chance to be a Chair.

9               CHAIRPERSON SCHEUER: Nancy, are you still  
10       interested in being Chair?

11              VICE CHAIR CABRAL: I'm willing to serve my  
12       time, if so appointed.

13              COMMISSIONER CHANG: That's what I would  
14       like to ask. Is there someone who would like to be  
15       the Chair? Nancy, would you like to be the Chair?

16              VICE CHAIR CABRAL: I'm not opposed. I  
17       cannot be nearly as good as Jonathan has been, and  
18       I'll have to learn everyone's last name, call you by  
19       last names. And I'm not opposed to not being it.  
20       I'm have no -- I'm perfectly happy being here.

21              COMMISSIONER WONG: I spoke to Commissioner  
22       Ohigashi. He doesn't really want to be in any  
23       position if possible. He really doesn't want to. I  
24       just wanted to tell you that when I talked to him  
25       last, just FYI for the other Commissioners.

1           COMMISSIONER OKUDA: Chair, I prefer not to  
2 have to do any more work, so please leave me out of  
3 any discussion including any nominating committee.

4           CHAIRPERSON SCHEUER: Commissioner Chang.

5           COMMISSIONER CHANG: I'm just wondering, to  
6 facilitate this, is there anybody else here who would  
7 like -- any other Commissioners, then I mean if  
8 Nancy -- I'm really comfortable with what you are  
9 thinking.

10          CHAIRPERSON SCHEUER: So we can't really  
11 deliberate.

12          COMMISSIONER CHANG: Other than having a  
13 committee. Can we have a meeting?

14          CHAIRPERSON SCHEUER: We don't need a  
15 committee. Simply take it up for decision-making at  
16 the next agenda, and then people can make a motion.  
17 It is helpful to at least have one vice chair.

18          COMMISSIONER WONG: I would suggest two  
19 vice chairs, just because sometimes in the past,  
20 sometimes the Chair, first Vice Chair couldn't make  
21 it, so second Vice Chair had to take an active role.

22          COMMISSIONER CHANG: And the current Vice  
23 Chair is Aaron and Nancy?

24          COMMISSIONER WONG: Aaron, what is your  
25 thinking?



1           COMMISSIONER MAHI: I'm quiet. I like to  
2 get to the point. I'd be interested if, you know, if  
3 the group feels that I remain as Vice Chair, and then  
4 be willing to serve in that position.

5           CHAIRPERSON SCHEUER: Is there anyone  
6 interested in serving as the second?

7           COMMISSIONER CHANG: Arnold or Edmund.

8           COMMISSIONER WONG: Chair, suggest since  
9 Commissioner Chang, I'm not sure your position, but  
10 Commissioner Okuda, Commissioner Ohigashi doesn't  
11 want a position.

12          COMMISSIONER CHANG: I don't want a  
13 position either.

14          CHAIRPERSON SCHEUER: I think, Commissioner  
15 Chang, because unfortunately the governor didn't send  
16 your name down, it's problematic until he does.

17          COMMISSIONER WONG: So either Commissioner  
18 Aczon, yourself, myself as second Vice Chair.

19                So I just wanted to throw that out and let  
20 it be whatever, because we have the first Vice Chair  
21 more than likely will be Commissioner Mahi.

22                I just wanted to say --

23          CHAIRPERSON SCHEUER: We can end this item  
24 too. I just wanted to have some space for us,  
25 Sunshine Law, to discuss. I'll say I've really

1 enjoyed it, so thanks for the opportunity.

2 VICE CHAIR CABRAL: You've done an  
3 unbelievably good job.

4 COMMISSIONER CHANG: You've done a good  
5 job, Jonathan.

6 CHAIRPERSON SCHEUER: Are we ready to go  
7 onto our final executive session?

8 COMMISSIONER CHANG: Yes.

9 CHAIRPERSON SCHEUER: May I have a motion?

10 VICE CHAIR CABRAL: I'll move we go into  
11 executive session.

12 COMMISSIONER WONG: I'll second.

13 CHAIRPERSON SCHEUER: Just to be clear. To  
14 convene into executive session pursuant to HRS  
15 92-5(a)(4) to consult with its attorney regarding the  
16 Commission's powers, duties, privileges, immunities  
17 and liabilities, and HRS Section 92-5(a)(2) to  
18 consider personnel matters where consideration of  
19 matters affecting privacy will be involved.

20 Any discussion on the motion? All in favor  
21 say aye". Any opposed? We're in executive session.

22 (Executive session.)

23 (The proceedings adjourned at 2:30 p.m.)

24

25

## CERTIFICATE

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF HONOLULU            )

I, JEAN MARIE McMANUS, do hereby certify:

That on May 22, 2019 at 9:30 a.m., the  
proceedings contained herein was taken down by me in  
machine shorthand and was thereafter reduced to  
typewriting under my supervision; that the foregoing  
represents, to the best of my ability, a true and  
correct copy of the proceedings had in the foregoing  
matter.

I further certify that I am not of counsel for  
any of the parties hereto, nor in any way interested  
in the outcome of the cause named in this caption.

Dated this 22nd day of May, 2019, in Honolulu,  
Hawaii.

S/s Jean Marie McManus  
JEAN MARIE McMANUS, CSR #156